

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3142

Appeal MA13-197

Superior-Greenstone District School Board

December 30, 2014

Summary: The requester sought access to student transportation procurement records of the Superior-Greenstone District School Board's (the board's) consortium. The board denied access, stating that the consortium is an independent entity and that the consortium, not the board, has custody and control of the responsive records. This order finds that the consortium is part of the board. This order also finds that, if the consortium is not part of the board, then it has control of the consortium's responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1); Ontario Regulation 372/91; *Education Act*, R.S.O. 1990, c.E-2, section 190.

Orders and Investigation Reports Considered: Orders MO-2813, PO-1725, and PO-2775-R.

Cases Considered: *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366; *City of Ottawa v. Ontario*, 2010 ONSC 6835; and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

OVERVIEW:

[1] The Superior-Greenstone District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA) for

records related to the procurement of student transportation by the East of Thunder Bay Transportation Consortium (the consortium). The request was originally made to Superior North Catholic District School Board, but was forwarded to the board in accordance with section 18 of *MFIPPA*. The requester specifically sought access to:

1. the name(s) of the successful contractor(s), and all the bidders (respondents to the RFPs [Request for Proposals]),
2. copies of all contracts awarded to successful proponents for the 2011 and 2012 RFPs and any updates to contract terms, especially regarding rates for successive years (years 2-5),
3. date contract(s) awarded,
4. description of the work, including additional pieces of work added to the initial contracts of successful proponents,
5. who was disqualified from those RFPs and the reasons why,
6. what the rankings were via the master matrix used for evaluations, and copies of the master matrix,
7. copies of letters requesting debriefing sessions,
8. dates of the debriefing sessions,
9. questions asked by the proponents at these debriefing sessions,
10. specific feedback provided at these debriefings, either in briefing notes or materials offered (e.g. tables, charts, evaluation sheets), and
11. any other documentation related to these RFPs and the assessment of the bids (from bid closing date) and any 3rd party information used to assess these bids.

for contracts of \$10,000 or more awarded by whatever means and specifically, by directed negotiations (such as sole source), tender, RFS, RFI, RFQ and/or RFP during 2009, 2010, 2011 and 2012, and covering future years.

[2] The board issued a decision letter to the requester denying access to the requested records. The board explained that it does not have custody or control of the requested records. The board further stated that the requested records are within the

custody and control of the consortium itself. The board states that the consortium is not an institution to which *MFIPPA* applies.

[3] The requester (now the appellant) appealed the board's decision.

[4] During mediation, the board explained that it is not involved in the tendering process, was never provided with the records and does not have access to the responsive records. The board further explained that, while it does share space with the consortium from a facility perspective, records are not shared and stored together. The computers are password protected and passwords are not shared so board staff cannot access the consortium's information.

[5] Further, the board advised that it does not have physical possession of the responsive records. The board explained that if there was any communication between the board and the consortium about this or any other consortium business, the board was not subsequently provided with any documentation or records. The board advised that the consortium has a website and communicates directly with parents about bus cancellations and related matters. Parents or members of the public are referred by the board to the website or to contact the consortium directly. The board further stated that it did not have custody or control of the records and that it was the consortium that had both custody and control of the responsive records.

[6] With respect to the board's position that the consortium is not subject to *MFIPPA*, the appellant provided the mediator with a copy of "Financial Reporting for Transportation Consortia" dated September 2009 (the report) issued by the Ministry of Education (the ministry), which indicates that the board is a full partner in the consortium and that the consortium is unincorporated. The appellant indicated his belief that unless the board's consortium was an incorporated entity, the board should be able to produce the records requested.

[7] The appellant subsequently explained to the mediator that he was not satisfied with the board's decision and believed that, even if the board did not have the records in its possession, it should be able to obtain them from the consortium.

[8] The board advised the mediator that it maintains its position and suggested that the appellant obtain the requested records directly from the consortium that has a greater interest in the records.

[9] No further mediation was possible and the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. Representations were exchanged between the parties in accordance with section 7 of the Information and Privacy Commissioner's (the IPC's) *Code of Procedure and Practice Direction 7*.

[10] In this order, I find that the consortium is part of the board. In the alternative, if it is not part of the board, I find that the board has control of the consortium's records within the meaning of *MFIPPA*. In any event, I order the board to issue a new access decision to the appellant.

RECORDS:

[11] At issue are records related to the procurement of student transportation by the consortium, as described above.

DISCUSSION:

Background:

[12] The *Education Act* (the *EA*) sets out the powers and duties of publicly funded school boards across the province. Chief among the mandatory duties of a school board is the provision of "effective and appropriate education programs to its pupils."¹ School boards are also given the power to provide transportation to their pupils, including the power to enter into agreements with other entities for the provision of that transportation.²

[13] According to the ministry's website,³ student transportation affects 40% of the student population in Ontario, with over 800,000 students transported on about 18,000 vehicles daily. In 2013-14, the ministry allocated over 800 million dollars in funding to the province's school boards to transport students.⁴

[14] In 2006, the ministry introduced reforms designed to "support and strengthen the management capacity of boards" in the area of student transportation. Central to the reforms was the establishment of "transportation consortia". According to the ministry's Transportation Consortium Resource Guide (the Guide), the purpose of the establishment of transportation consortia is to streamline and economize the provision of safe and effective school transportation services among coterminous school boards.⁵ Transportation consortia are financed by participating school boards from their share of transportation funding from the ministry. According to the ministry, the reforms have resulted in better contract and performance management with increased transparency in the use of public funds.⁶

¹ Section 169.1(1)(c) of the *EA*.

² Section 190 of the *EA*.

³ <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/AboutTransportation.aspx?Link=Trans>

⁴ See <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/Funding/Default.aspx?Link=Trans> and http://faab.edu.gov.on.ca/Memos/SB2011/SB_10.pdf

⁵ See Transportation Consortium Resource Guide:

<https://sbsb.edu.gov.on.ca/VDIR1/Resources/AboutTransportation/SLE.aspx>

⁶ <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/AboutTransportation.aspx?Link=Trans>

[15] The Guide describes two business forms of transportation consortia available to school boards. The first is the unincorporated consortium which the ministry describes as an “interim step”. The Guide recommends that school boards move ultimately towards establishing legally separate not-for-profit corporations.⁷

[16] According to the report, there are 72 school boards in Ontario, but the number of school boards participating in transportation consortia is 100 because some school boards are participating in multiple consortia as full partners or purchasers of services. Only one school board in Ontario is not participating in a transportation consortium.⁸

[17] This order concerns a request to the Superior North Catholic District School Board, which was transferred under *MFIPPA* to the board, for records related to the procurement of student transportation by the consortium.

Is the consortium an institution subject to *MFIPPA*?

[18] The access provisions of *MFIPPA* apply to all municipal “institutions”. An institution is defined in section 2(1) 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”)

[19] In addition, Ontario Regulation 372/91 reads as follows:

1. (1) The following bodies are designated as institutions:

1. Belmont Improvement Area Board of Management.
2. Each board established for transitional purposes under section 7 of Ontario Regulation 204/03 (Powers of the Minister or a Commission in Implementing a Restructuring Proposal) made under the *Municipal Act, 2001*.
 - 2.1 The Board of Governors of Exhibition Place.

⁷ See Guide at page 2.

⁸ “Financial Reporting for Transportation Consortia” dated September 2009.

- 2.2 The Board of Management of the Hummingbird Centre for the Performing Arts.
3. Centre in the Square Inc.
4. Revoked: O. Reg. 48/12, s. 1 (2).
 - 4.1 Every corporation incorporated under section 142 of the *Electricity Act, 1998*.
 - 4.2 The Downtown Improvement Area Board of Management.
 - 4.3 The Hamilton Entertainment and Convention Facilities Inc.
5. Joint committees of management established under the *Community Recreation Centres Act*, all such committees.
6. Kitchener Housing Inc.
 - 6.1 Every local housing corporation incorporated under Part III of the *Social Housing Reform Act, 2000*.
7. Municipal Property Assessment Corporation.
8. Every source protection authority as defined in subsection 2 (1) of the *Clean Water Act, 2006*.
- 9.-11. Revoked: O. Reg. 343/08, s. 1 (3).
12. Toronto Atmospheric Fund.

[20] The board submits that the consortium is not an institution under *MFIPPA*, but a separately operated independent organization subject to shared oversight between four different school boards.

[21] The board states that the *EA* permits school boards to arrange for the transportation of their students to and from school and to make agreements with corporations, commissions or persons for the transportation of students. It explains that the consortium was created in 2008 by four school boards and the primary purpose of the consortium is to provide common transportation services to their respective students located within the jurisdiction of the consortium.

[22] The board states that under the terms of the Consortium Agreement (the agreement), the responsibility for procurement rests with the Transportation Manager or his/her designate - this includes preparing and requesting tender bids, entering into contracts with operators, and processing payments to operators. It states that:

Procurement was accomplished under an RFP process undertaken by the Consortium with the assistance of the Ministry of Education. Consortium directors participated in this process, but at the conclusion of the process, all records were retained by the Consortium, and not by individual directors...

Notwithstanding the unequal cost sharing [of the consortiums' operations], each of the four boards has an equal vote in the direction of the Consortium...

In addition, the Consortium maintains its own website - <http://etbtc.on.ca/> - and is responsible for communicating transportation-related information to users from all four boards. Where parents contact the School Board about transportation-related matters, they are directed to contact the Consortium...

[23] The board states that a school board is a corporate body created and designated under the *EA* and its regulations, whose members are elected by members of the public who are supporters of each board in question. It states that the consortium is not a school board in any sense of the *EA*, nor should it be considered one for the purposes of *MFIPPA*.

[24] The board submits that the fact that the consortium is unincorporated does not transform it into a school board, nor does it mean that the consortium is somehow a part of any of the four school boards that created the consortium.

[25] The consortium submits that it is not a "school board". It states that a district school board is a corporate body created under the *EA* and its regulations for the purpose of providing education for students in their region.

[26] The consortium supports the board's position that it was created by agreement of four different school boards to operate as an independent entity responsible for the transportation of students in their combined jurisdiction.

[27] The appellant states that the consortium is a creature of an agreement between the school boards and is owned by and is an operating arm of these boards. As such, he states, it is a department of an institution, the board.

[28] The appellant claims that because the consortium is an unincorporated entity, it should be considered to be part of a school board. He states that communication by the consortium on operational and other issues is not exclusive to it as school board principals have a communication role regarding "service use" (as in transportation service), following up on "operational...issues related to (their) students", and communicating, presumably to parents (amongst possible others), "information from the Transportation Officer". He states that this communication role of principals is consistent with the requirements of the *EA*, and consistent with the requirements for consortia, as operational arms controlled by boards, to comply with the *EA*.

[29] The appellant relies on section 190(6) of the *EA*, which allows a school board to make an agreement or agreements with a corporation, commission or person for the

transportation of students. He states that in the context of the current arrangement, there are two possible interpretations of this section:

1. Only a board can make an agreement or agreements with providers of transportation of pupils (e.g. school bus companies, taxi companies, single bus/taxi operator, etc.); or alternatively,
2. A board may make an agreement or agreements with defined party (ies) for transportation services who in turn contract(s) with providers of transportation of pupils (e.g. school bus companies, taxi companies, single bus/taxi operator, etc.).

[30] The appellant states that regardless of either interpretation, the defined providers/parties are stated in the *EA* as "a corporation, commission or person". He points out that the consortium is none of these and, therefore, as a consortium, it can only enter into transportation agreements because it is an operational arm of the board or boards it supports. He also states that the consortium, by its agreement with the school boards, is staffed by employees of those boards.

[31] The appellant relies on the Guide, which states that an unincorporated consortium does not exist in law as an entity separate from the participating school boards. He also relies on the following definition from the Guide, which provides that:

Unincorporated Consortium - A business structure for the organization and operation of a Transportation Consortium that is created and governed through a Consortium Membership Agreement, in which all participating School Boards are parties. An Unincorporated Consortium is not a separate legal entity from the School Boards themselves, and would only operate separately from an operational standpoint and not from a legal standpoint.

[32] The appellant states that for years, the ministry's procurement data on contract terms and rate results (the subject of this access request) was posted on the ministry's website. With the advent of the new RFP process and the introduction of "consortia", he states that the website has been removed and RFP results have not been made public thus, he states, shielding the use of public money by consortia from public scrutiny.

[33] In reply, the board states that it did not mean to suggest that literally all transportation-related communications with parents are handled by the consortium. Rather, communication is a shared responsibility between the consortium and the four school boards. The board has a "Transportation Officer", who communicates with the consortium on behalf of the board, communicating concerns that have been brought to his attention by principals and others. Similarly, the board acknowledges that school principals also play a communication function with respect to school transportation,

both communicating directly to parents and addressing discipline issues that might arise on a school bus.

[34] However, the board submits that this type of communication from principals is made in the ordinary course and flows from the requirements of the *EA*. Such communication would occur regardless of the transportation mode chosen or the means through which such transportation was arranged. It also states that all agreements entered into by the consortium are signed by the consortium's Transportation Coordinator/Manager,⁹ and by the chair of the consortium's board of directors.¹⁰

[35] Despite the consortium's unincorporated status, the board disagrees that the consortium is an "operating arm" of the boards that created it and that its records are subject to *MFIPPA*. It submits that the consortium and the four school boards that created it are governed by the terms of the agreement. The board states that the appellant:

... draws an analogy between transportation consortia and a variety of other bodies, such as police services boards and various municipal "autonomous bodies". [The board] submits that the analogy actually supports the School Board's position. Assuming that such bodies are indeed part of a municipality, they are nevertheless defined quite explicitly as institutions for the purposes of *MFIPPA*...

Thus, even though municipalities are defined as "institutions" for *MFIPPA* purposes, the drafters of the legislation separately added municipal service boards, transit commissions, police services boards, planning boards, and the like, regardless of their incorporation status or close connection to the municipalities they serve.

The contrast with school boards is very telling. Only school boards are designated as "institutions". There is no similar designation of transportation consortia that might be established by school boards. Thus, the Requester's own analogy breaks down, and supports a contrary finding - because transportation consortia have not been designated under *MFIPPA*, they cannot be found to be institutions under the legislation.

[36] The board further submits that the operational and administrative separation and independence of the consortium is sufficient to render the consortium separate from the board, and not an institution subject to *MFIPPA*.

⁹ The consortium's Transportation Coordinator is also the consortium's Transportation Manager and is a board employee.

¹⁰ The chair of the consortium's board of directors is also a board employee.

[37] The board states that, although the consortium is providing services on behalf of the four school boards to meet their legal duties, this is not the test to apply under *MFIPPA*. It further states that, subject to any applicable legal constraints, institutions are free to use other entities to assist in the fulfilment of their duties.

[38] Finally, the board urges me to consider the consequences if the consortium is no more than an "operating arm" of the four school boards, this would mean that the consortium is simultaneously part of four different school boards, presumably meaning that it is four institutions in one. Moreover, it states that the appellant's submissions could also lead to the conclusion that unincorporated transportation consortia are subject to *MFIPPA* as institutions, while incorporated consortia are not.

[39] In reply, the consortium reiterates its position that the consortium is not an "institution" subject to *MFIPPA*. It disputes the claim that it is an operating unit or "arm" of any one school board, including the board. It states that if the Legislature intended for *MFIPPA* to apply to consortiums, it could have done so by designating consortiums an "institution", pursuant to *MFIPPA* and/or Ontario Regulation 372/91.

[40] In surreply, the appellant relies on his earlier representations that state that the *Broader Public Sector Accountability Act, 2010*, (the *BPSAA*) applies to public sector organizations, which include school boards and the consortia organized for purposes of procurement of goods and services to the school boards. He states that the Broader Public Sector Procurement Directive Implementation Guidebook (the Directive) does not list "consortium/a" as one of its categories, but it does identify "school boards" and "corporations". He submits that the Legislature saw no need to expressly identify an additional category of "consortium" as an institution as it recognized consortia as having no legal status, being no more than a buyers group (for business efficacy reasons) on behalf of and as an extension of their "institutions", the school boards.

Analysis/Findings

[41] Section 4(1) of *MFIPPA* 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 unless . . .

[42] A record will be subject to *MFIPPA* if it is in the custody or under the control of an institution; it need not be both.¹¹

[43] A finding that a record is in the custody or under the control of an institution does not necessarily mean that a requester will be provided access to it.¹² Rather it

¹¹ Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

¹² Order PO-2836.

means that the institution must take steps to obtain the record (assuming it does not already have possession of the record) and then, after reviewing the content of the record, issue a decision responding to the access to information request. Access to the record can still be refused if the record is excluded from the application of *MFIPPA* under one of the provisions in section 52, or is subject to a mandatory or discretionary exemption (found at sections 6 through 15 and section 38).

[44] Section 2(1) of *MFIPPA*, set out above, defines institutions under *MFIPPA* to include a school board or any agency, board, commission, corporation or other body designated as an institution in the regulations. A board is defined under the *EA* as a district school board or a school authority. A school authority is defined under the *EA* and includes a board of a district school area.

[45] None of the parties argue that the consortium is a school board in itself under *MFIPPA*. Nor did any of the parties argue that it is an agency, board, commission, corporation or other body designated as an institution in Ontario Regulation 372/91. I accept that the consortium is not a standalone school board or an institution designated under Ontario Regulation 372/91.

[46] The issue in this appeal is whether the records of the consortium are in the custody or control of the board, either because the consortium is part of the board, or because the board has control of the records of the consortium. In this appeal, I find that the consortium is part of the board.¹³ I also find, in any event, that the responsive records of the consortium are in the control of the board.

The consortium is part of the board

[47] In support of my finding that the consortium is a part of the board, I note that the Guide defines a “transportation consortium” as “a set of coterminous school boards operating transportation services for their students in conjunction with one another through a business vehicle.”¹⁴ The very definition of a consortium, therefore, is that it is no more and no less than the school boards it serves.

[48] Further, the Guide defines “transportation service provider” as a third-party bussing company that provides bussing and transportation services to a transportation consortium. The Guide makes it clear, therefore, that the consortium is not a transportation service provider.

[49] The consortium at issue in this appeal was created by the agreement, and is composed of an equal partnership of the following four school boards:

¹³ This appeal concerns whether the consortium is a part of the board or whether the responsive records are in the custody or control of this school board. This order does not address whether the consortium is part of the other three school boards that comprise it.

¹⁴ See Guide at page 5.

- the board,¹⁵
- the Conseil Scolaire du Grand-Nord de L'Ontario #57,
- the Superior North Catholic District School Board #34B, and
- the Conseil Scolaire de District Catholique des Aurores Boreales #62.

[50] According to the agreement, the purpose of creating the consortium was to allow these four school boards to reduce their transportation costs and eliminate some duplication in the provision of bus services to their respective students. All approved costs and expenses relating to the consortium are financed by the participating school boards out of their legislative grants from the ministry. Each participating school board is liable for all financial obligations for which the consortium is legally liable.

[51] The agreement provides that the consortium is administered by a board of directors composed of the Chief Financial Officers from each of the four school boards or their staff designates. Further, the management of the consortium operation is conducted by the Transportation Manager (the TM), whose responsibilities, duties, benefits and privileges shall be those reasonably determined and assigned by the board of directors. The terms of the agreement require the TM to be an employee of the board.

[52] The TM¹⁶ is responsible for preparing and requesting tender bids for bus services, creating and maintaining contract and processing payments to bus operators. The TM has an office within the board's main offices and space on the board's computer networks to create and store the consortium's records.

[53] The agreement provides that the day to day activities of the consortium are the responsibility of the Transportation Coordinator (the TC), who is also an employee of the board. In this case one person, a board employee, fulfills both the role of the Transportation Coordinator and the Transportation Manager.

[54] The agreement provides that the head office of the consortium is within the offices of the board.

[55] The four school boards together control the consortium. The agreement includes the following provisions about the duties of the consortium's board of directors, which comprises a representative from each of the four school boards:

2.3 The Board of Directors shall, among other duties as may be required:

¹⁵ The institution in this appeal.

¹⁶ The agreement provides that the Transportation Manager and the Transportation Coordinator shall be employees of the board.

2.3.1 be responsible for the establishment of all management and administration policies of the Consortium;...

2.3.3 develop Consortium-wide strategic direction and policies relating to such services offered by the Consortium;...

2.3.7 set program priorities;

2.3.8 foster and facilitate inter-school board cooperation and sharing of information;...

2.3.12 report to each School Board....

[56] The board refers to section 190(1) of the EA, which permits the board to "provide for" transportation of students, and section 190(6), which permits it to enter into agreements "for the transportation of students". The agreement is not an agreement entered in to under section 190(6) of the EA.

[57] The consortium is not a provider of transportation services, but rather the mechanism by which the four school boards have consolidated management and administrative services for the provision of those services. I agree with the appellant that the consortium can only enter into transportation agreements under section 190(6) of the EA because it is doing so on behalf of the board.

[58] This would be consistent with page 6 of the Guide, which talks about the two ways in which school boards through unincorporated consortia can enter into contracts with the transportation service providers (the bus companies):

- a common contract covering all the boards, or
- each board signs its own separate contract.

[59] The consortium does not transport students for the school boards. The responsibility for transporting students rests with the bus companies and the responsibility for paying these companies rests with the school boards. The role of the consortium is to provide management and administrative support for the school boards to acquire the transportation services through third party providers.

[60] The consortium manages the provision of transportation on behalf of the school boards; however it is these school boards that have the legal responsibility for the provision of these services.

[61] Based on my review of the agreement, I disagree with the consortium that it is a separate entity because the operational and administrative tasks of the consortium are

separate and independent from those of the boards that comprise the consortium. I find that merely separating offices, that are located in the board's head office, and providing separate computer access and a website, and delegating some transportation-related operational and administrative tasks, does not render the consortium a separate entity from the board.

[62] The board states that it has undertaken a number of steps to ensure that the records of the consortium are isolated from the board's own records. The consortium's electronic records are stored on the board's computer network, which is accessible only to the TC and the board's Technology Department staff for network administration purposes. Nevertheless, it is common and appropriate for an organization to restrict access to certain records or categories of records to those which need to have access to those records. In Order PO-1725, the requester sought access to information from Cabinet Office's electronic calendar management database. In that order, former Assistant Commissioner Tom Mitchinson stated that:

The capabilities of the database in permitting employees to make entries relating to personal matters, and to place certain restrictions on access to its contents (subject to systems management considerations), are normal features of most electronic calendar management databases and are not inconsistent with the institution's lawful custody of the database and its contents, or with its responsibilities in relation to its records management functions.

[63] The board points to the consortium's website to supports its view that the consortium is a separate and distinct entity from the board. I do not agree that this is a significant factor. The consortium's website¹⁷ provides information about a variety of transportation matters for the four school boards, including transportation policies, bus routes, school zones, safety features, and contact information. It makes logistical sense to have one website where third parties can go to access information about the consortium.

[64] By reason of the *EA*, it is part of a school board's education mandate to provide transportation to students. In this appeal, the consortium's sole purpose is to provide administrative services related to the transportation of its member school boards' students, a function of school boards under the *EA*. It would be a perverse result if the establishment of a consortium to share transportation administrative services, which is entirely controlled and even staffed by the school boards, resulted in the removal of records from access under *MFIPPA*.

¹⁷ <http://etbtc.on.ca/home>

[65] In the case of *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (TEDCO)*,¹⁸ the Ontario Court of Appeal found that the City of Toronto Economic Development Corporation (TEDCO) was subject to the provisions of *MFIPPA* because TEDCO was deemed to be part of the City of Toronto. Although that case concerned the interpretation of section 2(3) of *MFIPPA*, the comments of the court are helpful in this appeal. In *TEDCO*, the court stated at paragraph 39 that:

...a formal and technical interpretation of s. 2(3)¹⁹ runs contrary to the purpose of [*MFIPPA*]. 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 [*MFIPPA*] 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. [Emphasis added by me]

[66] I agree with the court in *TEDCO* that it would be contrary to the purpose of *MFIPPA* and access to information legislation in general to permit school boards to evade their statutory duty to provide access to their information simply by delegating their powers to a consortium over which they hold ultimate authority.

[67] I also have considered the findings of Adjudicator Stella Ball in Order MO-2813, where she found that a police association was not subject to *MFIPPA*, as it was not an institution named in *MFIPPA* or Ontario Regulation 372/91, nor was there anything in the material before her that supported the appellant in that appeal's assertion that the association was created by the institution, a police services board. On the contrary, in this appeal, the consortium was created by the board, an institution under *MFIPPA*.

¹⁸ *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366.

¹⁹ of *MFIPPA*. This section reads:

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.

[68] Adjudicator Ball stated in Order MO-2813 that:

While the association may have a collective bargaining relationship with the board, this does not lead to the conclusion that it is a part of the board, co-manages the police service, or is synonymous with the police service. In his representations the appellant refers to the provisions of the *Police Services Act*, R.S.O. 1990, c. P.15. I have reviewed that *Act*, and it is apparent that associations and police boards are distinct entities with different purposes, with the role of associations being the representation of police officers with respect to their working conditions and remuneration. The provisions of that *Act* do not indicate that associations are created by the police boards with which they bargain.

[69] In this appeal, unlike the situation in Order MO-2813, I find that the consortium is part of the board, an institution under *MFIPPA*, and that it is subject to *MFIPPA*. It is not a distinct entity with a different purpose than the board. The consortium was created by the board and its three partner school boards and arranges transportation services for school board students, which is a function of school boards under section 190(1) of the *EA*.

[70] The situation in this appeal is similar to that in Reconsideration Order PO-2775-R, where Adjudicator Donald Hale determined that Victoria University was part of a provincial institution, the University of Toronto, even though Victoria University was not a listed institution in Regulation 460 under the *Freedom of Information and Protection of Privacy Act (FIPPA)*. In that order, Adjudicator Hale found that the degree of integration of the financial, academic and administrative operations supports the conclusion that Victoria University is part of the University of Toronto for the purposes of the *FIPPA*. He stated that:

...that the operational and financial affairs of Victoria [University] and the University [of Toronto] are integrated to a very high degree. The University provides funding in the form of a Block Grant and an Instructional Grant to Victoria to enable it to conduct its Arts and Science programs, under the auspices of the University's Faculty of Arts and Science. That funding is derived from several sources, including student tuition and government grants from the Province of Ontario, which are collected and disbursed by the University to the federated universities, including Victoria.

[71] In this appeal, as well, the operational and financial affairs of the consortium are integrated to a high degree with those of the four school boards named above. In sum, I find that a request for records of the consortium may be made to the board as the consortium is a part of the board. Accordingly, I will order the board, as an institution

under *MFIPPA* that has custody and control of the records, to issue a new access decision to the appellant.

The board has control of the consortium's records

[72] Even if the consortium is not "part" of the board, I find that the board has control of the responsive records. The records, as outlined in detail above, are RFP-related records concerning the acquisition and provision of student transportation services for students of the board and its partner boards.

[73] In addressing the issue of custody or control, I must have regard to the purposes of *MFIPPA*. In the *City of Ottawa v. Ontario*,²⁰ the Divisional Court found that in determining whether an institution has custody or control of a record, the analysis requires a purposive interpretation of the statutory language used in *MFIPPA*. The Court described the intent of the legislature in enacting *MFIPPA* as enhancing democratic values by providing its citizens with access to government information.

[74] Student transportation is part of a school board's responsibility under the *EA*. Interpreting the term "custody or control" as including access to records about the procurement of student transportation is consistent with the purpose of *MFIPPA* as set out in section 1(a) by enhancing a citizen's right to fully participate in democracy through access to information about this important government activity.²¹

[75] I also have regard to the two part test applied by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*²² in determining whether the board has control of records that are arguably not in its physical possession. The test is:

- (1) Do the contents of the document relate to a departmental matter?
- (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[76] Applying the first part of the test, the contents of the records relate to a function of the board.²³ The consortium's website states:

The school bus is an extension of the classroom. The school principal's authority applies aboard the school bus. The school principal is

²⁰ *City of Ottawa v. Ontario*, 2010 ONSC 6835.

²¹ *City of Ottawa v. Ontario*, (cited above).

²² 2011 SCC 25, [2011] 2 SCR 306.

²³ *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above; *City of Ottawa v. Ontario*, 2010 ONSC 6835 (Div. Ct.), leave to appeal refused (March 30, 2011), Doc. M39605 (C.A.); Orders 120 and P-239.

responsible for the behaviour and discipline of his/her students while they are on a school bus.

[77] The appellant sought access to records related to the procurement of student transportation. Student transportation is a matter that has been deemed to be a part of a school board's mandate by reason of section 190 of the *EA*. The board has the statutory power to provide transportation for its students and the transportation of students is a basic function of the board.²⁴ I further note that neither the consortium, nor the board, has suggested that the information at issue does not relate to the transportation of school board students. In fact, the consortium states that it:

...acknowledges that the departmental matter at issue [the transportation of students], at least indirectly, relates to a school board matter - the transportation of pupils.

[78] Concerning the second part of the test, I refer to my discussion above on the role and status of the consortium. Based on that and some additional considerations outlined below, and taking into consideration the terms of the agreement, I am satisfied that the board should reasonably be expected to obtain a copy of the records upon request:

- The consortium was created as an equal partnership of the four school boards for the purpose of providing common administration of transportation services.
- The board's own employees by the terms of the agreement, manage²⁵ and operate the consortium.²⁶ The consortium's Transportation Coordinator is also the consortium's Transportation Manager and is a board employee.
- The contract with the transportation service providers states that the consortium was formed to administer transportation services for the four school boards named above.²⁷
- The consortium is funded by the board and its three partner boards through funding the boards receive from the ministry. The board

²⁴ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

²⁵ The Transportation Manager, a board employee.

²⁶ The day to day activities is the responsibility of the Transportation Coordinator, a board employee.

²⁷ See page 36 of the RFP entitled: "Student Transportation Services: Request for Services (RFS), East of Thunder Bay Transportation Consortium, RFS EBTBC 2010-01", provided by the appellant.

receives approximately one and a half million dollars a year from the ministry to pay for the transportation of its students.²⁸

- Each school board, by the terms of the agreement, is jointly and severally liable for all financial obligations of the consortium.
- The agreement states that upon withdrawal from the consortium, a school board is entitled to obtain all records held by the consortium related to the services provided by the consortium to that school board. The agreement does not state that that is the only situation where a board is entitled to copies of consortium records. It would be an absurd situation that a partner school board would have access to records of the consortium after it is no longer a partner in the consortium, yet it is not entitled to the records while it is participating in the consortium.
- The consortium's electronic files are located on the board's computer network. The Transportation Coordinator, who is an employee of the board, has access to these files. As well, the board's Information Technology department has access to the consortium's electronic files for network administration purposes.
- The ministry's "Financial Reporting for Transportation Consortia" dated September 2009 provides that a consortium is required to provide financial information to school boards. It states that:
 - school boards with decision-making power within the consortium are full partners in the consortium;
 - school board auditors may require the consortium to be audited since the board uses the consortium's financial information; and
 - consortiums have to provide school boards with financial information for the province's year-end financial statements.

²⁸ See <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/Funding/Default.aspx?Link=Trans>

The document "Student Transportation - Grants for Student Needs, 2013-14" also states that the Conseil Scolaire du Grand-Nord de L'Ontario #57 receives over \$2,100,000 annually, the Superior North Catholic District School Board #34B receives over \$440,000 annually, and the Conseil Scolaire de District Catholique des Aurores Boreales #62 receives over \$730,000 annually from the ministry for student transportation.

- An RFP in this appeal for transportations services issued by the consortium provides that *MFIPPA* applies to information provided to the consortium by a qualified provider of transportation services.²⁹ It reads:

The Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M.36, as amended, applies to information provided to the Consortium by a Qualified Supplier. The confidentiality of information supplied by Qualified Suppliers (including their Submissions) will be maintained by the Consortium, except as otherwise required by law or by order of a court or tribunal... [Emphasis added by me].

- The RFP contact person is the Transportation Coordinator. His contact information is listed as the board's address, the board's fax number and his email address at the board.³⁰
- The chair of the consortium's board of directors is the Manager of Finance for the board. He has access to the consortium's records to fulfill his duties as a director.
- An unresolved dispute between the consortium's board of directors is referred to the Director of Education, a board employee.³¹
- The board in its representations admits that it has possession of the records.

[79] To summarize and recapitulate, the following factors support a finding of board control over the records³²:

- the provisions of the agreement outlined above about the extensive involvement of the board and its partner school boards in creating, owning, and operating the consortium;

²⁹ The appellant provided a copy of certain pages of the RFP. See page 33 of this RFP entitled, Student Transportation Services: Request for Services (RFS), East of Thunder Bay Transportation Consortium, RFS EBTBC 2010-01.

³⁰ See page cover page and page 27 of the RFP entitled: "Student Transportation Services: Request for Services (RFS), East of Thunder Bay Transportation Consortium, RFS EBTBC 2010-01". Also see board's website at: <http://www.sgdsb.on.ca/> and consortium's website at <http://etbtc.on.ca/contact>

³¹ See section 7 of the agreement and also see <http://www.sgdsb.on.ca/article/march-2013-sgdsb-organizational-chart-139.asp>

³² *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

- the role of the consortium as a provider of administrative services to the board for transportation services, a responsibility of the board under the *EA*;³³
- the complete funding of the consortium by the board and its partner school boards;
- that there was no understanding or agreement between the board and the consortium or any other party that the records were not to be disclosed to the board and the fact that the board has a right to access both paper and electronic the records in certain circumstances;³⁴
- the terms of the RFP concerning the application of *MFIPPA* to proponents' information;
- the involvement of board employees in the management and operation of the consortium; and,
- the financial reporting requirements of the consortium to the board.

[80] Having regard to the board's ownership and control of the consortium, its management of the consortium through its employees or appointees, and the participation of its employees in the RFP processes at issue, I find that, the board could reasonably be expected to obtain the records on request.

[81] In conclusion, I have found that the consortium is part of the board for the purposes of the *Act*. Even if it is not part of the board, I conclude that the board has control of the consortium's records. I will order the board to issue an access decision to the appellant for the responsive records.

³³ Order PO-2386.

³⁴ Orders M-165 and MO-2586.

ORDER:

I order the board to issue a new access decision to the appellant in accordance with the terms of this order, treating the date of this order as the date of the request.

Original Signed By:
Diane Smith
Adjudicator

December 30, 2014