

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-3146

Appeal MA13-474-2

London District Catholic School Board

December 30, 2014

**Summary:** The requester sought access to student transportation procurement records of the London District Catholic 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*, 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 London District Catholic School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the Act)

for records related to the procurement of student transportation issued by the board's consortium, the Southwestern Ontario Student Transportation Services (the consortium). The requester specifically sought access to:

With respect to each of the 2011 RFP<sup>1</sup> for student transportation services in Oxford and area, and the 2012 RFP for student transportation services for London and area:

1. the name(s) of the successful contractor(s), and all the bidders (respondents to the RFPs),
2. contract value (i.e. the rates that have won the RFPs),
3. date contracts(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,
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...
11. any other documentation related to these RFPs and the assessment of the bids (from bid closing date) and any 3<sup>rd</sup> party information used to assess these bids.

[2] The board issued a decision letter to the requester, as follows:

The requested records belong to the Southwestern Ontario Student Transportation Services, which is an independent and incorporated private business, not subject to the access provisions under the *Municipal*

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<sup>1</sup> Request for Proposal.

*Freedom of Information and Protection of Privacy Act.* The student transportation company operates as a separate legal entity from the school board pursuant to the *Ontario Corporations Act*.

Please be advised that the records you have requested do not exist within the institution since the records are not in the custody and control of the London District Catholic School Board.

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

[4] During mediation, the board claimed that it was not involved in the RFP process and was never provided with the responsive records. It claimed that the RFP for bus services was issued directly by the consortium and the consortium used the services of a procurement consultant to assist in the development of the RFP document and process. The board maintained that it only received notice of the successful proponents.

[5] The board advised the mediator that it does not have access to responsive records. The board further explained that the consortium is a separate legal entity and the board does not have physical possession of the responsive records. The consortium has its own website and communicates directly with parents about bus transportation and related matters. Parents enter into arrangements directly with the consortium. The board further stated that it did not have custody or control of the records and that it was the consortium who had both custody and control of the responsive records.

[6] With respect to the board's position that the consortium is not subject to the *Act*, 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. While it indicated that the consortium is incorporated, it is the appellant's position that the board should still be able to obtain the requested records from the consortium and provide them to him.

[7] The appellant stated 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 request them from the consortium.

[8] 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 of Ontario's (the "IPC's") *Code of Procedure and Practice Direction 7*.

[9] 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. In any event, I order the board to issue a new access decision to the appellant.

## **RECORDS:**

[10] Records related to the 2011 RFP for student transportation services in the Oxford and area, and the 2012 RFP for student transportation services for London and area, as described above.

## **DISCUSSION:**

### **Background:**

[11] 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."<sup>2</sup> 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.<sup>3</sup>

[12] According to the ministry's website,<sup>4</sup> 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.<sup>5</sup>

[13] 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> Section 169.1(1)(c) of the *EA*.

<sup>3</sup> Section 190 of the *EA*.

<sup>4</sup> <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/AboutTransportation.aspx?Link=Trans>

<sup>5</sup> 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](http://faab.edu.gov.on.ca/Memos/SB2011/SB_10.pdf)

<sup>6</sup> See Transportation Consortium Resource Guide:

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

<sup>7</sup> <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/AboutTransportation.aspx?Link=Trans>

[14] 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.<sup>8</sup>

[15] 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.<sup>9</sup>

[16] This order concerns a request to the board for records related to the procurement of student transportation by the consortium.

### **Is the consortium an institution subject to *MFIPPA*?**

[17] The access provisions of the *Act* apply to all municipal "institutions". Institution is defined in section 2(1) of the *Act* as follows:

- (a) a municipality,
- (b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,
- (c) any agency, board, commission, corporation or other body designated as an institution in the regulations; ("institution")

[18] 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.

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<sup>8</sup> See Guide at page 2.

<sup>9</sup> "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.

[19] The board states that the consortium is not a municipality, a school board or a transit commission and therefore, does not meet the definition of an "institution" under *MFIPPA* and is not subject to the *Act*. It states that the consortium is a not-for-profit organization incorporated under the *Corporations Act*,<sup>10</sup> whose purpose is to implement and administer transportation services for school boards throughout Ontario.

[20] According to the RFPs attached to the consortium's representations,<sup>11</sup> the consortium is a joint venture which administers the transportation requirements of the board and the Thames Valley District School Board (TVDSB). The consortium states that as a corporation, it exists as a separate legal entity from these school boards.<sup>12</sup>

[21] The consortium also states that it does not meet the definition of "institution" in the *Act*. It further states that the extension of the definition of an institution in section 2(3) of the *Act*<sup>13</sup> only applies to a municipality, and not to other types of institutions. It

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<sup>10</sup> (Ontario).

<sup>11</sup> RFP # 11-01 and RFP # 12-001, "Services for the Transportation of Students for Southwestern Ontario Student Transportation Services".

<sup>12</sup> The consortium refers to the document "Financial Reporting for Transportation Consortia", Ontario Ministry of Education, September 2009.

<sup>13</sup> Section 2(3) of *MFIPPA* 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.

states that to extend that section beyond municipalities is to ignore the grammatical and ordinary sense of the words in section 2(3).

[22] The consortium states that it enters into contracts with and supervises third parties providing transportation services for the two school boards, but it has contracted for other school boards in the past, and it may be invited to contract for other boards in the future. It did not, however, offer any details of where it has provided services to other school boards beyond the board or the TVDSB.

[23] The consortium further states that no board employees work for the consortium or work at its offices and that no consortium employees work at school board offices. It states that consortium employees are not employed by or paid by the client school boards and that the consortium's employees are only answerable to the consortium's General Manager.

[24] The appellant states that his access request is directed to post-RFP evaluation and scoring results derived in sessions attended by both the consortium and respective school board representatives.

[25] 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.

[26] The appellant states that the RFP contains a requirement "to disclose" (subject to various restrictions in the *Act*). He refers to certain provisions in the 2011 RFP mentioned in his request, including section 4.28 of this RFP, which reads:

...Information provided by the Proponent may be subject to and may be required to be released in accordance with the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M56 as amended... The confidentiality of such information will be maintained by the Consortium, except where an order by the Information and Privacy Commission or a Court or other governmental authority having jurisdiction requires the Consortium to do otherwise... [Emphasis added by me].

[27] Similarly, the appellant refers to certain provisions in the 2012 RFP mentioned in his request, including section 4.29, which reads:

Information provided by a Proponent may be subject to and may be required to be released in accordance with the Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c.M56 as amended... The Consortium will use reasonable efforts to maintain the

confidentiality of such information, but will disclose same pursuant to any order by the Information and Privacy Commission or a Court or other governmental authority having jurisdiction requiring the Consortium to do so. [Emphasis added by me].

[28] In reply, the consortium states it is a separate body entrusted with evaluating, selecting and contracting with transportation providers and was created to take these processes out of the hands of individual purchasing managers and centralize it in the hands of a central administrator.

[29] The consortium states that the RFP alerts prospective proponents that information they provide may be subject to release under *MFIPPA*, but this is not an acknowledgment that such information shall be subject to release. It states that it is appropriate to advise proponents of this possibility, and to assure proponents that they will be contacted and afforded an opportunity to challenge disclosure of their private information.

[30] The consortium states that the only document the appellant identifies as having been copied to the board are the letters sent to all proponents advising as to the outcome of the RFP process. It states that it only sends these letters to the school boards as it does not involve the school boards' purchasing managers in the minutiae of the selection process. It submits that as a separate body, it is the role of consortium to deal with the minutiae of the selection and contracting process.

[31] The consortium agrees with the appellant that funding for student transportation originates with the ministry and that school boards and transportation consortium are subject to the rules in the *EA*. It states that transportation consortia are established to relieve school boards of the expense and potential liability of operating their own transportation services, to enhance safety, and to provide consistency and deliver savings by eliminating duplication and centralizing administration of the service. This results in a separate entity being created which cannot act at the behest of or in the interests of only one of its clients. Instead of serving the interests of one board at the expense of another, it must act independently from the separate and sometimes competing interests of its clients, in a manner which is determined to be in the best interests of all of its clients. No one board can dictate how the consortium is going to be operated and no one board can control its decision making processes.

[32] The consortium notes that there are civil claims in respect of the selection of service providers, and that the aggrieved bus operators have not claimed against the school boards, but only against the consortia, which it submits supports the view that consortium are separate entities.



[33] The consortium submits that it would be inappropriate for the IPC to extend the definition of "institution" when it is clear and obvious that the legislative intent is to reserve exclusively to the legislature the right and responsibility to determine when and in what circumstances the definition of "institution" is to be extended.

[34] The consortium states that board transportation managers are copied on letters advising as to the outcome of the RFP process and are involved in the debriefing, if a proponent requires a debriefing.

[35] In surreply, the appellant states that his access request is based on information regarding contracting results and not the propriety of a contracting process among parties. He states that the Legislature never approved moving nearly one billion dollars of public funding of student transportation out of public oversight.

[36] The appellant further states that his request has nothing to do with litigation and was submitted prior to any litigation being commenced. He states that he simply wants access to information that was publicly available before the introduction of transportation consortia.

### ***Analysis/Findings***

[37] 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 . . .

[38] 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.<sup>14</sup>

[39] 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.<sup>15</sup> Rather it 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).

[40] Section 2(1) of the *Act*, 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

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<sup>14</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, 2011 ONSC 172 (Div. Ct.).

<sup>15</sup> Order PO-2836.

district school board or a school authority. A school authority is defined under the *EA* and includes a board of a district school area.

[41] None of the parties argued 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 school board or an institution designated under Ontario Regulation 372/91.

[42] 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 custody or control of the records of the consortium. I find that the consortium is part of the board.<sup>16</sup> I also find, in any event, that the records of the consortium are in the control of the board.

*The consortium is part of the board*

[43] Section 190(1) of the *EA* permits a school board to arrange for the transportation of students. Section 190(6) of the *EA* allows a school board to make an agreement or agreements with a corporation, commission or person for the transportation of students. On my review of the material before me, it appears that the consortium is not a provider of transportation services in the sense of operating school bus services but is, rather, the mechanism by which the two school boards have consolidated management and administration of the provision of those services. It is the intermediary through which those transportation services are provided to the boards.

[44] The consortium is a corporation.<sup>17</sup> The consortium provided a copy of its articles of incorporation and By-law Number 1, "A by-law relating generally to the conduct of the affairs of [the consortium]."

[45] The Guide, issued by the ministry, provides for the structure and operation of transportation consortia by school boards in Ontario. The preamble for the Guide sets out the purpose of the establishment of transportation consortia: "...to streamline and economize the provision of safe and effective school transportation services among coterminous School Boards."

[46] According to the Guide, in an incorporated transportation consortium the participating school boards decide who will represent each school board on the board of directors. The board of directors manages the consortium. The Guide states that in the case of an incorporated transportation consortium:

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<sup>16</sup> This order only concerns the London District Catholic School Board. The other school board, the TVDSB, is not a party to this appeal and I did not seek representations from this school board.

<sup>17</sup> By-law Number 1 is the by-law of the consortium.

The voting members of the Transportation Consortium would be the participating School Boards. In other words, the corporate School Board is the voting member and not individuals. Voting members vote for the Board of Directors, as well as having the right to vote on other major issues affecting the corporate entity, as set out in the Ontario Corporations Act. Since the corporate member acts through individuals, it is appropriate for the School Boards to designate the individual or individuals who will exercise the vote on behalf of the School Board...

The Board of Directors manages the Consortium, approving budgets, developing policy and controlling the direction of the organization...

The actual management of the Consortium and the provision of transportation services should be managed by an Operations Committee, which would consist of equal representation of administrators from each School Board, together with the Corporation's officers.

[47] Consistent with the Guide, section 9.1 of By-Law Number 1 provides that the two sole voting members of the consortium are the board and the TVDSB. Section 4.1 of this by-law states that the affairs of the consortium shall be managed by the board of directors consisting of two directors appointed or elected by each of the voting members (the school boards). By-Law Number 1 also states that the board of directors may appoint a General Manager to whom it delegates the power to manage and direct the affairs of the corporation. The representations of the consortium indicate that it is managed by a General Manager. The representations do not indicate whether, in addition to the General Manager, this consortium has the type of Operations Committee described in the Guide.

[48] Under By-Law Number 1, the General Manager is subject to the direction of the board of directors, as well as any special resolution of the Voting Members. Section 8.9 of the by-law states that the General Manager "shall at all reasonable times give to the directors or any of them all information they require regarding the affairs of the Corporation."

[49] As I noted above, both RFPs state that:

The Consortium is a joint venture which administers the transportation requirements of the London District Catholic School Board (LDCSB)<sup>18</sup> and the Thames Valley District School Board (TVDSB).

[50] Furthermore, the ministry's "Financial Reporting for Transportation Consortia" dated September 2009 states that school boards that form transportation consortiums

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<sup>18</sup> The board.

are full partners in their consortia. According to the ministry, participating school boards share decision-making power within a consortium.<sup>19</sup>

[51] As I have indicated, the consortium does not provide the transportation services to the school boards; instead it contracts with service providers. The responsibility for transporting students rests with the bus companies and the funds for paying these companies originates with the school boards. Based on the structure I have described above, the role of this consortium is to provide management and administrative support on behalf of and for the school boards to acquire the transportation services from third party providers.

[52] As stated above, the consortium was "...established to relieve school boards of the expense and potential liability of operating their own transportation services...and centralizing administration of the service."<sup>20</sup> As set out in the provisions of By-Law Number 1 referred to above, through the corporation, the school boards share management and control of the consortium with each other. By reason of the *EA*, it is part of their education mandate to provide transportation to students. Through the consortium, school boards share management of the provision of those services.

[53] Based on the above information concerning the structure and purpose of the consortium, the co-ownership and control of the consortium by the board, and the role of the consortium in the provision of student transportation under the *EA*, I find that the consortium is part of the board.

[54] The board receives approximately \$12,000,000 annually from the ministry for student transportation.<sup>21</sup> Prior to the establishment of the consortium, the type of records covered by this request would be covered by *MFIPPA*. It would be a perverse result if the establishment of a consortium to share transportation administrative services, which is entirely controlled by school boards, resulted in the removal of records from access under *MFIPPA*.

[55] In the case of *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (TEDCO)*,<sup>22</sup> the Ontario Court of Appeal found that

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<sup>19</sup> "Financial Reporting for Transportation Consortia" dated September 2009, at page 5.

<sup>20</sup> Reply representations of the consortium.

<sup>21</sup> [http://www.saferoutestoschool.ca/oldsite/downloads/Saving\\_Money\\_and\\_Time\\_with\\_AT-Final-Sept\\_2010.pdf](http://www.saferoutestoschool.ca/oldsite/downloads/Saving_Money_and_Time_with_AT-Final-Sept_2010.pdf) at page 38 of "Ministry of Education, Effectiveness & Efficiency Follow-up Review Southwestern Ontario Student Transportation Services, E&E Follow-up Review April 2013, Final Report" at <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/EnEReviewReports.aspx?Link=Trans> also see <https://sbsb.edu.gov.on.ca/VDIR1/Student%20Transportation/Funding/Default.aspx?Link=Trans> "Student Transportation - Grants for Student Needs, 2013-14", which states that the TVDSB receives over \$33,000,000 annually from the ministry for transportation services.

<sup>22</sup> *City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario*, 2008 ONCA 366.

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)<sup>23</sup> runs contrary to the purpose of the *Act*. We are dealing with a corporation whose sole shareholder is the City of Toronto, whose sole purpose is to advance the economic development of the City, and whose board of directors - at the time of the proceedings before the adjudicator - was populated by persons directly appointed by City Council, including the Mayor of Toronto (or his/her designate), the Chair of the City's Economic Development and Parks Committee, two City Councillors, and the Commissioner of Economic Development, Culture and Tourism (or his/her designate). In light of what La Forest J. observed in the above-cited passage from *Dagg*, it seems to me that TEDCO is just another example of a complex bureaucratic structure of public administration. In my view, it is contrary to the purpose of the *Act* and access to information legislation in general to permit the City to evade its statutory duty to provide its residents with access to its information simply by delegating its powers to a board of directors over which it holds ultimate authority. [Emphasis added by me].

[56] In this appeal, the consortium is managed by school boards through their appointment or election of the members of the board of directors.

[57] In its articles of incorporation, the objects for which the consortium was incorporated are:

to facilitate and advance education in the elementary, secondary and post-secondary, public and private schools systems in the Province of Ontario by:

- a) providing student transportation to and from elementary, secondary and post-secondary, public and private schools in the Province of Ontario; and

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<sup>23</sup> 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.

- b) developing, supporting, implementing and advancing educational and training programmes and innovative projects which will promote the cause of publicly-funded education and training generally, and education and training specifically, and/or benefit communities;
- c) maintaining and operating non-profit education, employment, training and support centres in the community;
- d) making or awarding gifts or awards to individuals, organizations, corporations, or institutions for accomplishment in and to assist in the furtherance and promotion of the field of education and training;
- e) such other complementary activities which will further these objects.

[58] School boards, which administer Ontario's schools under the *EA*, have the same objectives under the *EA*.<sup>24</sup>

[59] On the consortium's website,<sup>25</sup> its Mission Statement states that:

Whereas the Ministry of Education mandated that coterminous School Boards form a transportation consortium for the purpose of seeking service efficiencies and potential cost savings, Southwestern Ontario Student Transportation Services [the consortium] is therefore responsible for the coordination and day to day operations of school busing within Elgin, Middlesex and Oxford counties *on behalf* of its' member School Boards.

[The consortium] will design and monitor service for home to school transportation in keeping with its' governing policies and procedures which have been jointly agreed upon by its' member school boards. [The consortium] is committed to planning and delivering service which is safe, effective and efficient. [My emphasis].

[60] As in *TEDCO*, I find that it would be contrary to the purpose of the *Act* 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.

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<sup>24</sup> See Part VI of the *EA*.

Also see the ministry's website: <http://www.edu.gov.on.ca/eng/educationFacts.html>

<sup>25</sup> <http://www.mybigyellowbus.ca/docs/policies/STS%20Mission%20Statement.pdf>

[61] 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 the *Act* 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 two school boards, which are institutions under the *Act*.

[62] 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.

[63] In this appeal, unlike the situation in Order MO-2813, I find that the consortium is part of the board. It is not a distinct entity with a different purpose than the board. The consortium was created by the board and the TVDSB and arranges transportation services for students of school boards, which is a function of school boards under section 190(1) of the *EA*. The records relate to a function of a school board, the transportation of students.<sup>26</sup>

[64] 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 the University of Toronto, even though Victoria University was a separate legal entity. 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 *Freedom of Information and Protection of Privacy Act*. 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

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<sup>26</sup> *City of Ottawa v. Ontario*, 2010 ONSC 6835.

tuition and government grants from the Province of Ontario, which are collected and disbursed by the University to the federated universities, including Victoria.

[65] In the appeal before me, as well, funding for student transportation originates with the ministry and is given to school boards to use for that purpose. Although the consortium is a separate legal entity from the board, it is a joint venture between the board and the TVDSB. It is subject to the board's direction through the board's control (along with the TVDSB) of the consortium's board of directors, and other powers vested in the school boards as voting members.

[66] The appellant has made a request to the board for records related to the procurement of student transportation issued by the consortium. As I have found the consortium to be a part of the board, therefore, I find that the board has custody and control of the responsive records. Accordingly, I will order the board, as an institution under the *Act* that has custody and control of the records, to issue a new access decision to the appellant, treating the date of this order as the date of the request.

*The board has control of the consortium's records*

[67] 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 the board and the TVDSB.<sup>27</sup>

[68] In addressing the issue of custody or control, I must have regard to the purposes of *MFIPPA*. In the *City of Ottawa v. Ontario*,<sup>28</sup> 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.

[69] 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.<sup>29</sup>

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<sup>27</sup> See RFPs referred to above.

<sup>28</sup> *City of Ottawa v. Ontario*, (cited above).

<sup>29</sup> *City of Ottawa v. Ontario*, (cited above).



[70] In applying a purposive approach to the question of “custody or control”, the Divisional Court<sup>30</sup> found useful the list of factors developed by former Commissioner Sidney Linden in Order 120:

- Were the records created by an officer or employee of the institution?<sup>31</sup>

(Copies of the records have not been provided to me; nevertheless, I find that certain records would have been created by the board. The records contain information about the evaluation and scoring of the bids submitted in response to the RFPs. The board’s Manager of Purchasing Services was involved in the evaluation process and also was the contact person for receipt of the proponent’s bids.)

- What use did the creator intend to make of the records?<sup>32</sup>

(The records were intended to be used in relation to the awarding of transportation contracts to transport school board students, including students of the board.)

- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the records?<sup>33</sup>

(The records were as part of the assessment process of bids submitted by potential providers of transportation of school board students. Under section 190 of the *EA*, the board has a statutory power to provide transportation for school board students.)

- Is the activity in question a “core”, “central” or “basic” function of the institution?<sup>34</sup>

(Under section 190 of the *EA*, the transportation of school board students is a basic function of the board.)

- Does the content of the records relate to the institution’s mandate and functions?<sup>35</sup>

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<sup>30</sup> *City of Ottawa v. Ontario*, (cited above).

<sup>31</sup> Order 120.

<sup>32</sup> Orders 120 and P-239.

<sup>33</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>34</sup> Order P-912.

<sup>35</sup> *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.) and Orders 120 and P-239.

(The contents of the records relate to the board's mandate and function under the *EA*. The transportation of school board students is part of the board's mandate and function under the *EA*.)

- Does the institution have physical possession of the records, either because they have been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?<sup>36</sup>

(It appears that the board has had physical possession of many responsive records; however, it has returned some or all of them to the consortium.)

- If the institution does have possession of the records, is it more than "bare possession"?<sup>37</sup>

(The board has not acknowledged that it has retained any of the responsive records.)

- If the institution does not have possession of the records, are they being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?<sup>38</sup>

(The consortium's representations indicate that its employees are not employed or paid by the two school boards.)

- Does the institution have a right to possession of the records?<sup>39</sup>

(As the board's Manager of Purchasing Services was involved in the receipt and evaluation of the bids, it appears that the board had a right to possess the records, which, according to the consortium, have been returned to the consortium by the board. By-Law Number 1 provides, however, that the consortium's General Manager must "at all reasonable times give to the directors [who are representatives of the school boards] all information they may require regarding the affairs of the consortium.")

- Does the institution have the authority to regulate the records' content, use and disposal?<sup>40</sup>

(As the board's Manager of Purchasing Services was the team lead in the bids' evaluation processes, the board may have had this authority.)

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<sup>36</sup> Orders 120 and P-239.

<sup>37</sup> Order P-239 and *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>38</sup> Orders 120 and P-239.

<sup>39</sup> Orders 120 and P-239.

<sup>40</sup> Orders 120 and P-239.

- Are there any limits on the use to which the institution may put the records, what are those limits, and why do they apply to the records?<sup>41</sup>

(This factor is more relevant to a situation where the records are in the possession of an institution but the institution may have limitations on its ability to deal with them.)

- To what extent has the institution relied upon the record?<sup>42</sup>

(The board, in conjunction with the consortium, has relied on these records in the awarding of transportation contracts for the board's students.)

- How closely is the record integrated with other records held by the institution?<sup>43</sup>

(According to the consortium, the records are no longer held by the board but by the consortium.)

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?<sup>44</sup>

(Before the advent of the transportation consortium, these records would have been in the custody and control of school boards. This is a case of first instance involving an incorporated transportation consortium.)

[71] I also have had regard to the two part test applied by the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*<sup>45</sup> 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?

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<sup>41</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above.

<sup>42</sup> *Ministry of the Attorney General v. Information and Privacy Commissioner*, cited above and Orders 120 and P-239.

<sup>43</sup> Orders 120 and P-239.

<sup>44</sup> Order MO-1251.

<sup>45</sup> 2011 SCC 25, [2011] 2 SCR 306.

[72] Applying the first part of the test, the contents of the records relate to a function of the board.<sup>46</sup> 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.<sup>47</sup> I further note that neither the consortium nor the board has suggested that the information at issue does not relate to the transportation of board students.

[73] Further, the policies of the consortium describe the school bus as an extension of the classroom. The school principal's authority applies aboard the school bus. The consortium's policy "Responsibility of the School Principal and Designates" states that the school bus is deemed to be an extension of the class room.<sup>48</sup> Principals are responsible for the discipline of students for conduct occurring on school buses.<sup>49</sup>

[74] Concerning the second part of the test, I refer to my discussion above on the role and status of the consortium, and the evidence above on the list of factors from Order 120. Based on that and some additional considerations outlined below, and taking into consideration the terms of the RFPs and By-law Number 1, I find that the board should reasonably be expected to obtain a copy of the records upon request:

- The consortium is a joint venture which administers the transportation requirements of the board, the institution in this appeal, and the TVDSB. The relationship between the board and TVDSB with respect to the consortium is governed by a joint membership agreement (the Membership Agreement);<sup>50</sup>
- The Membership Agreement is a written agreement between the consortium and the voting members, which are the board and the TVDSB. The officers of the consortium sign contracts, documents or instruments and perform all powers and duties as may be assigned to them by the board of directors, subject, however to the Membership Agreement and any special resolution of the voting members, the two school boards.

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<sup>46</sup> *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.

<sup>47</sup> Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

<sup>48</sup> <http://www.mybigyellowbus.ca/docs/policies/Responsibility%20of%20the%20School%20Principal%20and%20Designates%201.4.pdf>

<sup>49</sup> See <http://www.mybigyellowbus.ca/docs/School%20Bus%20101%20for%20Students.pdf>

<sup>50</sup> See section 1.1 of RFP # 11-01 and RFP # 12-001.

- The consortium is funded by these two school boards with funds received from the ministry.
- The proposals made in response to the RFPs were delivered to the offices of the board, not to the consortium's offices. The board, therefore, had responsive records in its possession;
- The letters sent to each proponent as to the results of the RFP process were copied to the Manager of Purchasing Services for the board and the TVDSB, who were also included in the debriefing of those proponents.<sup>51</sup> The RFP Evaluation Committee is comprised of representatives of the consortium, the board and the TVDSB. As well, the board's Manager of Purchasing Services was the Evaluation Team Lead for the 2011 RFP evaluation.<sup>52</sup>
- The RFPs for transportations services issued by the consortium state that information provided by the proponent may be subject to and may be required to be released in accordance with *MFIPPA* and may be disclosed by an order of the IPC.
- The RFPs state that proponents must direct all questions regarding the RFP via email, to the RFP authority, the Manager of Purchasing Services at the board, with a copy to the consortium's General Manager.<sup>53</sup>
- The ministry's "Financial Reporting for Transportation Consortia" dated September 2009 states that:
  - school boards with decision-making power within the consortium are full partners in the consortium;

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<sup>51</sup> Reply representations of consortium.

<sup>52</sup> See section 1.8 of RFPs and also pages 74 to 86 of "RFP #11-01 Evaluator Training Guide" at <http://home.isboa.ca/docs/SWOSTS/Responding%20Motion%20Record%20-%20Volume%202.pdf>

This document states that the evaluation Team Lead for the RFP evaluation is the board's Manager of Purchasing Services. Her responsibilities are to coordinate the evaluation activities, including:

- Managing all evaluation documentation.
- Logging issues.
- Requesting support to clarify, or to advise on an issue.
- Coordinating the clarification question process with the Proponents.
- Scheduling meetings.
- Reviewing and confirming scoring results of each evaluator.
- Tabulating final scoring results.

<sup>53</sup> In RFP 12-001, there is also an option to direct questions to the public website [www.biddingo.com](http://www.biddingo.com)

- 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.

[75] 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.

[76] 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.

**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