

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3145

Appeal MA13-473

Kenora Catholic District School Board

December 30, 2014

Summary: The requester sought access to student transportation procurement records of the Kenora Catholic 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 Kenora Catholic District 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 Northwestern Ontario Student Services Consortium (the consortium). The requester specifically sought access to:

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 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 requested records. The board explained that it did not have custody or control of any of the records. The board further stated that the requested records are within the custody and control of the consortium, and noted that the consortium is not an institution to which the *Act* applies.

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

[4] During mediation, the board explained that the consortium is solely responsible for the procurement of transportation services. The board is not involved in the procurement process and does not have any responsibility for those records. The contracts for bus transportation are entered into between the consortium and the bus companies directly.

[5] The board stated that it, along with other school boards, does have an agreement in place with the consortium. The board further explained that the consortium has its own website and communicates directly with parents about bus transportation and related matters. The board further stated that it does not have responsive records and never has.

[6] With respect to the board's position that 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, which indicates that the board is a full partner in the consortium. It also indicates that the consortium is unincorporated. The appellant indicated his belief that unless the board's consortium was an incorporated entity instead of an unincorporated consortium, the board should be able to produce the records requested.

[7] The appellant stated that he was not satisfied with the board's explanation 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'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] At issue are records related to the procurement of student transportation issued by the board's consortium, 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.”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

[12] 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

[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.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

[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.⁷

[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

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>

⁷ See Guide at page 2.

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

[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.
 - 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.

⁸ "Financial Reporting for Transportation Consortia" dated September 2009.

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 and the consortium are represented by the same counsel and provided virtually identical representations. They submit that the consortium is not an institution under *MFIPPA*, but a separately operated independent organization subject to shared oversight between four different school boards,

- the board,⁹
- Keewatin-Patricia District School Board (KPDSB),
- Northwest Catholic District School Board (NCDSB), and
- Conseil scolaire de district catholique Aurores boreales (CSDCAB).

[20] They state that these four school boards have legitimately established, as equal partners, a manner in which to efficiently transport pupils to schools in their combined jurisdiction.

[21] They state that section 190 of 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. They explain that the primary purpose of the consortium is to provide common transportation services to the four school boards.

[22] They state that the consortium is administered by a board of directors comprised of a Senior Business Official from each school board or their staff designate. The board's Manager of Operational Services sits as a member of the consortium's board of directors.

⁹ The Kenora Catholic District School Board, the institution in this appeal. This order only concerns whether the consortium is part of the board or whether the board has control of the consortium's records.

[23] They state that the consortium's office space is a separate facility with separate telephone access, physical locks to the office, and electronic passwords to its electronic records. The consortium maintains a separate, secure space on the board's computer network and has access restricted to its staff and individuals from the board's Information Technology department for network administration purposes only. The consortium maintains a separate website,¹⁰ hosted by a third party service provider, and a separate email address used to communicate directly to its various stakeholders, including students, parents schools and school boards as well as operators and transportation service providers about consortium matters.

[24] The General Manager of the consortium is responsible for managing the day-to-day operations of the consortium.

[25] They state that the consortium was established and is run as an independent entity, separate and apart from any of its signatory school boards with respect to the provision of transportation services for students in their combined jurisdiction.

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

[27] 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.).

[28] The appellant states that regardless of either interpretation, the defined providers/parties are stated in the *Act* 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.

¹⁰ www.NWOBUS.ca

[29] 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.

[30] 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.

[31] In reply, the board and the consortium dispute the appellant's claim that the consortium is an operating unit or "arm" of any one School Board. They state that if the Legislature intended for municipal privacy legislation to apply to consortiums, it could have done so by designating consortiums, such as the consortium, as an "institution", pursuant to *MFIPPA* and/or O. Reg. 372/91.

[32] In surreply, the appellant relies on his initial representations where he stated 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

[33] 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 . . .

[34] 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

[35] 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 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).

[36] 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.

[37] 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.

[38] 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

[39] 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.

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

¹² Order PO-2836.

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 school boards that comprise it.

¹⁴ See Guide, above, at page 5.

[40] 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.

[41] The consortium at issue in this appeal was created by the agreement, and is composed the board and three other boards listed above.

[42] The agreement states that these four school boards have created a:

...Consortium (Joint Venture) which enables them to reduce cost and eliminate some duplication in the extension and provision of services...

The Consortium shall be administered by a Board of Directors composed of four members (one from each school board)....

[43] The agreement provides that the management of the consortium shall be conducted by the Manager of Transportation whose responsibilities, duties, compensation and benefits and privileges shall be those reasonably determined and assigned by the board of directors.

[44] According to the agreement, the four school boards pay all of the operating, overhead and administrative costs of the consortium. These costs are paid by these school boards out of their legislative grants from the ministry. Each school board is liable for all financial obligations for which the consortium is legally liable.

[45] All of the individuals that comprise the consortium, including the Manager of Transportation,¹⁵ are either officers or employees of the four school boards.

[46] The 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:

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

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

¹⁵ The General Manager of the consortium, who is referred to as the Manager of the Transportation in the agreement, provided an affidavit in this appeal. She is an employee of the KPDSB.

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

2.3.11 report with efficiency and effective improvement recommendations to each School Board; and

2.3.12 establish a policy committee comprised of one senior business official per board and one trustee per board for the purpose of developing a common transportation policy.

[47] The role of the consortium, according to the agreement, appears to me to be the provision of administrative and management services to the four school boards with respect to one part of their mandates. In particular, according to section 1.2 of the agreement:

The purpose of the creation of the Consortium is the anticipated financial and operational efficiencies to be achieved by the respective parties hereto as a result of collectively participating in the provision of services and the elimination of duplication while still providing excellent pupil transportation. There is also the hope and expectation that the provision and/or the purchasing of services or goods in common by the Consortium can attract favourable price adjustments which otherwise are unavailable to the individual parties...

[48] 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 with others "for the transportation of students". The agreement is not an agreement entered in to under section 190(6) of the *EA*. 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.

[49] 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.

[50] 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.

[51] 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.

[52] The consortium's Manager states that she has the authority to directly enter into contracts on behalf the consortium, including Transportation Agreements with bus operators, without the involvement of any of the school boards. Nevertheless, her authority to do so is derived from the consortium's four board of directors, each of whom is a staff member of one of the participating school boards. As stated in the Amending Agreement to the agreement her authority is subject always to the authority and direction of the Board of Directors, including the right to require the Manager of Transportation to execute or not execute and carry out all agreements or contracts which require execution on behalf of the consortium.

[53] Based on my review of the agreement, I disagree with the consortium that it is a separate entity because some of 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 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.

[54] 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 are accessible only to the consortium's staff¹⁶ and three individuals from the board's Technology Department 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

¹⁶ The consortium's staff are all part of one of the four participating school boards.

contents, or with its responsibilities in relation to its records management functions.

[55] The board points to the consortium's website to support 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.

[56] 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*.

[57] 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

¹⁷ <https://www.nwobus.ca/>

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.

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]

[58] 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.

[59] 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*.

[60] 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.

[61] 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 the three partner boards and arranges transportation services for school board students, which is a function of school boards under section 190(1) of the *EA*.

[62] 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.

[63] 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.²⁰ 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

[64] 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 three partner school boards.

[65] In addressing the issue of custody or control, I must have regard to the purposes of *MFIPPA*. In the *City of Ottawa v. Ontario*,²¹ 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.

[66] 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

²⁰ The KPDSB, the NCDSB, and the CSDCAB are not parties to this appeal and did not provide representations in this appeal, as the request was not made or transferred to them.

²¹ *City of Ottawa v. Ontario*, 2010 ONSC 6835.

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.²²

[67] 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)*²³ 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?

[68] Applying the first part of the test, the contents of the records relate to a function of the board.²⁴ The school bus is an extension of the classroom. The school principal's authority applies aboard the school bus. The consortium's Policies and Procedures webpage includes a "Discipline on School Buses" policy²⁵ that states that:

Every pupil is responsible for his/her conduct to the principal of the school where the pupil attends. The Code of Behaviour developed by the attending school shall govern the conduct of the student. Any breach of any individual school's Code of Conduct may result in the suspension or cancellation of bussing privileges...²⁶

The Principal or designate shall determine the circumstances surrounding a reported breach of conduct by a student on a school bus and shall determine the form and extent of discipline, if such is warranted...

[69] 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.²⁷ I further note that neither the consortium,

²² *City of Ottawa v. Ontario*, (cited above).

²³ *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306.

²⁴ *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.

²⁵ <https://nwobus.ca/policies-procedures/>

²⁶ See also section 9.3 of the agreement which requires the partner school boards to "Follow up operational and discipline issues related to students of their Board".

²⁷ Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, cited above.

nor the board, has suggested that the information at issue does not relate to the transportation of 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.

[70] 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 a joint venture school board consortium for the purpose of providing common administration of transportation services to four school boards.
- The board's own employee participates in the management and operation of the consortium.²⁸
- The consortium is funded by the board and its three partner boards through funding these school boards receive from the ministry. The board itself receives approximately one million dollars a year from the ministry to pay for the transportation of its students.²⁹
- Each school board, by the terms of the agreement, is liable for all financial obligations and all activities of the consortium.³⁰
- 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

²⁸ The board's Manager of Operational Services sits as a member of the consortium's board of directors. The day to day activities is the responsibility of the Manager of the consortium, a KPDSB employee. According to section 3.1 of the agreement, her responsibilities, duties, compensation and benefits and privileges are determined and assigned by the Board of Directors.

²⁹ 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" states that the KPDSB receives over \$4,200,000, the NCDSB receives over \$1,100,000, and the CSDCAB receives over \$730,000 annually from the ministry for transportation services.

³⁰ See sections 4.1, 4.2 and 6.4 of the agreement.

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 consortium's staff, which includes staff from the board, has access to these files and the board's Information Technology staff are responsible for network administration.
- 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.
- An RFP for transportations services issued by the consortium provides that *MFIPPA* applies to information provided to the consortium by a qualified provider of transportation services.³¹ 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].
- This RFP provides that the contact person is the Purchasing and Payables Officer from the KPDSB.³²

³¹ The appellant provided a copy of certain pages of an RFP. See page 35 of this RFP entitled: "Student Transportation Services: Request for Services, RFP-P93-2012, Northwestern Ontario Student Services Consortium, RFS NWOSSC 2010-01".

³² The consortium states that to assist with the completion of its procurement processes, it contracted for the services of a KPDSB staff member from the KPDSB Purchasing Department with purchasing and

[71] To summarize and recapitulate, the following factors support a finding of board control over the records³³:

- 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;
- 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*;³⁴
- the complete funding of the consortium by the board and its partner school boards;³⁵
- 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 board staff, through their roles as members of the consortium, have a right to access both paper and electronic the records;³⁶
- the terms of the RFP concerning the application of *MFIPPA* and the jurisdiction of the IPC 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.

[72] 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.

[73] 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.

administrative expertise, and that any records that may have been accessed, reviewed and/or put in the possession of the KPDSB staff member were returned to it.

³³ *Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.).

³⁴ Order PO-2386.

³⁵ See section 4.1 of the agreement.

³⁶ 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