

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3355

Appeal PA12-364

Ministry of Government Services

June 25, 2014

Summary: The ministry received a request for access to the number of death certificates (dispositions) registered with the City of London for 2010 and 2011 and, specifically, how many dispositions were linked to each funeral home in the city. The ministry denied access to the record on the basis of the exemption in section 17(1) (third party information) of the *Act*. After certain third parties consented to disclosure of the portions of the record relating to them, the ministry issued a supplementary decision in which it disclosed the total number of dispositions relating to the homes that consented to disclosure. The ministry maintained that section 17(1) applied to the number of dispositions relating to 10 funeral homes which did not consent to disclosure.

This order determines that the information about the number of dispositions for identified funeral homes in 2010 and 2011 does not qualify for exemption under section 17(1) and orders that it be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1)(a) and 17(1)(c).

OVERVIEW:

[1] The Ministry of Government Services (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the number of deaths registered with the City of London for 2010 and 2011. The request stated:

I would specifically like to know how many Burial Permit[s] were issued and to whom they were issued to (example: specific funeral home name, specific transfer service, specific individual).

If this information is not collected or [retrievable], I would like to know how many burials and cremations were linked to a specific funeral home, transfer service and individual in the City of London, Ontario for 2010 and 2011.

[2] In response to the request, the ministry advised the requester that it was notifying a number of parties whose interests may be affected by disclosure of the records. After notifying those parties, the ministry issued a decision in which it denied access to the responsive record on the basis of the exemption in section 17(1) (third party information) of the *Act*.

[3] The appellant appealed the ministry's decision.

[4] During mediation, the parties confirmed that the responsive record is a document which lists the "Home" and the number of "Dispositions" (ie: death certificates) for each home for each of the years 2010 and 2011.

[5] Also during mediation, some of the funeral homes named in the record consented to the disclosure of information relating to them. The ministry then issued a supplementary decision in which it disclosed the name and the number of dispositions relating to the homes which consented to disclosure. The ministry also disclosed the number of dispositions linked to the general category "others," which the ministry explained includes unregistered funeral homes, transfer services, individuals and out-of-province burials.

[6] The appellant confirmed that he continues to seek access to the remaining withheld information, which consists of the number of dispositions for each of the years 2010 and 2011 for the remaining 10 named funeral homes.

[7] Mediation did not resolve this appeal and it was transferred to the inquiry stage of the appeal process. I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the ministry and 10 funeral homes (the affected parties), initially.

[8] In addition, during the processing of this file, one of the affected parties took the position that the withheld information contains personal information. As a result, I invited the parties to also address the issue of whether the withheld information qualifies as personal information as defined in section 2(1) of the *Act*.

[9] I received representations from the ministry and three affected parties.

[10] I then sent a copy of the Notice of Inquiry to the appellant, along with a copy of the non-confidential portions of the ministry's representations. I also summarized for the appellant the representations I received from the affected parties. The appellant provided representations in response.

[11] In this order, I find that the requested record does not qualify for exemption under sections 17(1)(a) or (c), and I order that it be disclosed. I also find that the record does not contain personal information.

RECORDS:

[12] The record at issue is a one-page list. The list is divided into two years (2010 and 2011), and for each year it lists the name of the funeral home and the number of dispositions connected to that funeral home for the identified year.

[13] The withheld information at issue consists of the names of 10 specific "Homes" and the number of "Dispositions" for each identified home for the years 2010 and 2011.

ISSUES:

A: Does the mandatory exemption at section 17 apply to the withheld information?

B: Does the record contain "personal information" as defined in section 2(1)?

DISCUSSION:

Background information about the record

[14] The ministry provides background information about the record, which assists in understanding the nature of the information at issue and how it is in the ministry's custody.

[15] The ministry begins by confirming that it created the record responsive to the request.

[16] It then confirms that funeral homes must comply with statutory reporting and registration requirements before they can undertake dispositions, and refers to the requirements in sections 22(1) and 35(5) of the *Vital Statistics Act* ("VSA"). These provisions confirm that no dispositions shall occur unless the funeral director completes a Form 15 Statement of Death (Form 15) and delivers it to the division registrar, who then registers it.

[17] The ministry also identifies the provisions in the VSA which relate to the safekeeping and confidentiality of death registrations.¹ The ministry states that death certificates can be obtained from the Registrar General, but that these death certificates do not include the name of the funeral home that conducted the disposition.² The ministry also states:

Death registrations serve two purposes. Firstly, completed death registrations are permanent legal records of individuals' deaths. Secondly, they provide information on the characteristics of individuals who die and essential information on the cause of death. This information is the source of mortality statistics which form the basis of extensive and longstanding public health research.

[18] The ministry confirms that it developed the record responsive to the request based on the information it has about the names of the funeral homes and the number of dispositions (i.e. death certificates) for each funeral home in the City of London for the years 2010 and 2011.

Issue A: Does the mandatory exemption at section 17 apply to the withheld information?

[19] The ministry and the three affected parties who provided representations take the position that the information at issue qualifies for exemption under section 17(1) of the *Act*, which reads, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

¹ The ministry refers to sections 2(5), 53(1) and 57.

² Reference is made to section 43(2) of the *VSA*.

[20] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁴

[21] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

Part 1: type of information

[22] In order for a record to fit within this part of the three-part test, its disclosure must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information. The ministry argues that the information in the record is commercial and financial information. The affected parties state that the information is commercial information, and one affected party states that it is "trade secret" information. These terms have been defined in prior orders as follows:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known,
and

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct). leave to appeal dismissed, Doc. M32858 (C.A.) ("*Boeing*").

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁵

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁸

Representations and findings

Trade secret

[23] One of the affected parties states that "the number of funerals each funeral home performs each year has historically been a 'closely guarded trade secret'." However, another affected party states that "similar information could be obtained by monitoring death announcements in the newspaper."

[24] The information at issue is simply the number of dispositions each funeral home conducted for the calendar years 2010 and 2011. This is not information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism. In the circumstances, I find that the information in the record does not constitute a "trade secret" for the purpose of section 17(1).

Commercial information

[25] The affected parties and the ministry take the position that the information is commercial information of the funeral homes. The ministry's representations in support of this position state that the information is commercial information because it describes information related to the sale of services (i.e. the provision of dispositions and related products, such as coffins and urns) and could be used to create an accurate estimate of the revenue and profits of the affected parties.

⁵ Order PO-2010.

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

[26] The ministry also refers to Order PO-2169 in support of its position that the information at issue is "commercial information." In that order, former Assistant Commissioner Tom Mitchinson considered whether the number of emission tests ("drive clean" tests) a garage facility conducted constituted "commercial information" for the purpose of section 17(1) and found that it did. He stated:

Having reviewed the pro forma Drive Clean performance agreement used by the Ministry and the various participating garage facilities, I have some reservations as to whether it reflects a commercial relationship in the usual sense, since the garage is not selling a product or service to the Ministry.

However, there can be no dispute that garage facilities operate as commercial enterprises, selling goods and services to their customers for a fee. Emission testing services clearly fit within this category, and I agree that information which would reveal testing activity for an identifiable facility relates directly to the operation of the facility's business, and falls within the scope of the definition of "commercial information".

[27] I agree with the approach taken by the former Assistant Commissioner, and similarly find that the information about the number of dispositions conducted by each named funeral home for the identified time periods relates to the operation of the funeral homes' business, and falls within the definition of "commercial information."

Part 2: supplied in confidence

[28] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.

[29] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[30] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.

[31] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.

[32] One of the affected parties states that it supplied the information to the ministry in confidence, "based on verbal assurances of confidence." It also states that the "information included in the documentation provided to the ministry is not accessible from other public sources and is prepared for a purpose that would not entail disclosure." One of the other affected parties, however, states that similar information could be obtained by monitoring death announcements in the newspaper.

[33] The ministry states that under section 35(5) of Regulation 1094 under the VSA, funeral directors must complete a Form 15 and supply it directly to the division registrar, who then issues a burial permit. The ministry submits that the information in the record was "supplied" to it, as it was directly provided by third party funeral homes in accordance with the mandatory reporting requirements set out in Regulation 1094. It also refers to a number of orders⁹ which have confirmed that information provided to an institution pursuant to a mandatory reporting requirement in legislation or regulation is "supplied" for the purposes of subsection 17(1).

[34] In support of its position that the information was supplied in confidence, the ministry refers to the confidentiality provisions of the VSA, its regulations and Form 15, and states that these provisions "are analogous to strong representations of confidentiality." It states: "These confidentiality provisions give rise to an objective expectation, on the part of funeral home operators, that information supplied to the ministry is done so in confidence."

[35] The ministry then reviews in some detail the statutory provisions governing the information in death registrations and death certificates,¹⁰ and states:

Members of the public are able to view death certificates, pursuant to subsection 44(2) of the VSA, but they are not entitled to view death registrations. Death certificates, unlike death registrations, do not contain the name of the funeral home that conducted the burial or crematory

⁹ P-345, P0-2142 and P0-2903.

¹⁰ The ministry specifically references sections 2(5) and 53(1) of the VSA.

service. It is submitted that this information is not otherwise disclosed to a source to which the public has access, and that this is evidence of a reasonable expectation of confidentiality.

[36] In addition, the ministry refers to the wording found on Form 15, and states:

Form 15 states that the information collected on the form will only be used for limited purposes, such as statistical, research, medical, law enforcement, adoption and adoption disclosure purposes. Notably, commercial and financial purposes are excluded from this list.

[37] The ministry submits that this also provides funeral homes with a reasonable basis to conclude that the information is communicated in confidence and will be kept confidential. In addition, the ministry submits that Form 15 and burial permits are completed in each instance "for a purpose that does not entail disclosure." Rather, they are completed "for the purpose of creating legal records of deaths and to enable the collection of death statistics for public health and other research purposes."

[38] Based on the information provided to me by the ministry, I am satisfied that the information contained in the record at issue which identifies the number of dispositions for each of the ten funeral homes for the years 2010 and 2011 was supplied to the ministry by the funeral homes with a reasonable expectation that this information (relating to the number of dispositions) was supplied in confidence. The fact that information about the number of dispositions relating to each funeral home is not included in the information ordinarily accessible to the public supports this finding.

[39] Accordingly, I find that the second part of the three-part test has been met for the withheld information contained in the record.

Part 3: Harms

[40] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm."¹¹ Evidence amounting to speculation of possible harm is not sufficient.¹²

¹¹ In the recent decision of the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner) (Community Safety)*, 2014 SCC 31, the Court discussed the standard of proof required to establish the risk of harm from disclosure under access to information legislation, and provided general guidance on the application of exemptions that are based on risk of harm. The Court concluded that there should be one consistent formulation of the standard, requiring that a party resisting disclosure provide evidence establishing a "reasonable expectation of probable harm". While proposing this single formulation, the Court also recognized that there was "no practical difference" between it, and the formulation applied by this office in previous decisions (para 53).

¹² *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[41] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.¹³ Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.¹⁴

[42] The ministry and the affected parties take the position that the harms under sections 17(1)(a) and (c) will result from disclosure of the record. I will review each of these harms in turn.

Section 17(1)(a)

[43] As set out above, this section applies where the disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

[44] The ministry argues that, based on the information received from an affected party and considering the information generally available about the funeral home industry, disclosure of the record at issue could reasonably be expected to prejudice the competitive position of many funeral home operators in the London marketplace.

[45] The ministry begins by reviewing the representations it received from one of the third parties who objected to disclosure, in which the third party indicates its concerns that the request constitutes “data mining” and is a threat to the commercial viability of their business. The ministry notes that the third party expressed concern that disclosure of this information could be leveraged against them by competitors, and that there was a “probability” that this information could be combined with publicly available information to extrapolate their business incomes, which would provide their competitors with a competitive advantage. The ministry refers to confidential information it received from this affected party in support of these concerns, and notes that, as a consequence, the affected party has been “extremely cautious” about further disclosure of confidential information, and expressed its belief that the information that may be disclosed by the ministry would be used by competitors against it.

[46] The ministry then states that these concerns can apply to all small or independent funeral home operators in the London marketplace who may not have the operational and financial resources that are available to their larger or corporate competitors.

¹³ Order PO-2020.

¹⁴ Order PO-2435.

[47] The ministry then provides what it identifies as an “Environmental Scan” of the Funeral Home Industry, and provides information about the industry based on newspaper and other articles. This information can be summarized as follows:

- the funeral home industry has recently faced a number of challenging trends including:
 - the global economic downturn,
 - the existence of independently owned and operated funeral homes is being challenged by a trend towards consolidation in the industry,
 - smaller and independent funeral homes are being targeted or purchased by large corporate interests;
- the funeral home industry has experienced shrinking profit margins as a consequence of a number of factors, including the increasing popularity of cremation.

[48] The ministry then states that, because of this, commercial and financial information about competitors is becoming increasingly valuable within the funeral services industry.

[49] The ministry then states:

While the IPC has stated ... that subsection 17(1) cannot be used to shield third parties from normal market competition, disclosure in this context would result in serious prejudice to the competitive position of many third parties because of two notable factors present in the funeral services industry. Firstly, funeral homes operate within a competitive, but highly restricted, environment. Funeral homes have only a limited number of potential customers within a calendar year for their primary service. The size of the market in which funeral service providers compete cannot be increased through business practices and development strategies. Funeral homes are subject to the local mortality rate and must challenge competitors for market share instead of focusing on opportunities for market growth.

Secondly, businesses in the funeral services industry derive the vast majority of their revenue from the one product, which is the disposition of the body through burial or crematory services. The substantial similarity of the core elements of this product results in minimal differentiation between competitors within the industry. Consequently, a business’

clientele and financial information, such as revenue and profits, are its primary confidential and commercially valuable information.

[50] The ministry then refers to four specific factors or considerations which inform its position that the harms in section 17(1)(a) would result from disclosure of the number of dispositions for each funeral home. These are:

a) The Number of Services Provided Within the Industry

[51] The ministry refers to Order PO-2169 (the “drive clean” order referred to above), which concluded that the competitiveness of the industry and the number of services that third parties offer are factors that may be considered in determining whether disclosure of particular information could reasonably be expected to significantly prejudice a third party’s competitive position.

[52] It also refers to Order MO-1246 which found that there is an increased risk of competitive harm through disclosure of sensitive information in a single function industry.¹⁵ The ministry then states that the funeral services industry is essentially a single service industry, as all of the activities and products which funeral homes provide are directly related to dispositions, and that operators derive a significant percentage of their revenue directly from dispositions. The ministry submits that this should be a significant consideration in evaluating the competitive harm that may result from the disclosure of the requested record.

[53] The ministry also distinguishes the finding in Order PO-2169 (the “drive clean” order) relating to harms, and states that although the IPC found that the harms were not established in that appeal, a number of the reasons for that decision are not relevant to this appeal, and it distinguishes the other factors from those at issue in this appeal.¹⁶

b) Financial Inferences That Can Be Drawn Through Industry Experience

[54] The ministry states that previous orders have found that the industry experience of a competitor and their resulting ability to draw inferences from information requested under the *Act* can be evidence of the reasonable expectation that a third party will suffer harm from the disclosure of such information. It refers to Order PO-2786, which determined that even if records contain only general information about an affected

¹⁵ This order involved a request for a report about the towing industry in the City of Toronto, where the City claimed that a consideration in evaluating competitive harm was that the towing business was a single function service without many opportunities for differentiation, and that disclosure would create disproportionate harm for smaller companies. I note that the information at issue in that appeal included the rates charged by each company, together with average wait and hook-up times.

¹⁶ It states that the finding in that Order was based on the fact that emissions testing was one of a variety of products offered by the facilities, and that therefore competitive harm was unlikely to result from the disclosure of financial information.

party, competitors in the industry could use their industry experience to draw inferences from such information and thereby determine the affected party's strategies, processes and financial data.

[55] The ministry then states that, in this appeal, disclosure would prejudice the competitive positions of funeral home operators in the London marketplace by providing competitors the opportunity to adopt market tactics that would enable them to selectively target industry rivals who may be more financially vulnerable. It states that disclosure of the number of burial permits issued to each funeral home would allow a competitor to accurately assess the financial situation and current level of profitability of any third party, and that a competitor could use its experience within the industry to extrapolate a third party's profitability by multiplying the cost of the funeral by the number of permits issued and then deducting a reasonable estimate of the third party's expenses based upon their industry experience. It states "given the lack of opportunity to expand the size of the funeral services market, competitors will most likely focus their efforts on leveraging this information against their rivals to gain a larger share of the market, as this is where their resources would be most beneficially utilized to provide the highest return."

[56] The ministry then states that while the records do not explicitly reveal the profitability of any third party, this does not preclude the records from satisfying the test for exemption under subsection 17(1)(a). It states:

If the information would enable a competitor to calculate the third party's profitability based upon other information that is publicly available or would be known to the competitor, this is sufficient to result in a finding of competitive disadvantage for a third party.

[57] It refers to a decision of the Federal Court of Canada¹⁷ in relation to the *Access to Information Act* (Canada) which determined that the disclosure of information which would allow a competitor, in conjunction with publicly available information, to calculate the third party's costs and profits was sufficient to establish a reasonable expectation of harm. The Court found that it placed the third party at a disadvantage when bidding on subsequent contracts through enabling competitors to calculate pricing scenarios and undercut the third party in future instances of bidding. The ministry states:

Within the funeral services industry, businesses are in direct competition with each other for a relatively static market. Therefore, the disclosure of important commercial and financial information could similarly be expected to allow competitors to make strategic decisions about

¹⁷ *Culver v. Canada (Minister of Public Works and Government Services)*, [1999] F.C.J. No. 1641 (Fed. Ct.). I note that the information at issue in that decision was the final selling rates for the repair and overhaul of military aircraft engines.

employing pricing, marketing, and operational strategies designed to obtain market share from vulnerable third parties.

c) The Relative Size of the Parties Within the Industry

[58] The ministry states that this office has found that the relative size of the parties can be a relevant factor in determining whether disclosure could reasonably be expected to significantly prejudice a third party's competitive position. It refers to Order PO-2558, which considered a decision from the British Columbia Information and Privacy Commissioner finding that the ability of a third party to withstand harm may be a reasonable consideration in determining whether third party information should not be disclosed.

[59] The ministry states that, in this appeal, there is a considerable range in the number of dispositions that each third party funeral home conducted in 2010 and 2011 and that the relative size of the parties is a relevant consideration in determining whether the third parties have a reasonable expectation of harm. It then states:

Given this discrepancy in size, the competitive position of many smaller third parties would be prejudiced if they were forced to reveal their financial information to their competitors. For example, smaller funeral homes, including independent and family-run businesses, may be less likely to operate for a period of time with low profit margins in the event that a competitor introduces a new pricing strategy to attract their clientele.

d) The Impact of Disclosure on Negotiations Related to the Prospective Sale of Funeral Homes

[60] The ministry states that a party may use information about the revenue and profitability of a competitor to make or respond to an offer to purchase that competitor, that disclosure of the record would provide a prospective purchaser with an understanding of both the income stream and the financial state of the competitor, and that this information would "likely inform the valuation of the business and the price offered." It then states that the party receiving the offer would not be able to control when, how and whether to disclose information about its operations to the prospective purchaser, thereby prejudicing its negotiating position.

[61] The ministry states that this office has found that the premature disclosure of the value of an asset or business to a prospective purchaser can interfere with contractual negotiations relating to that asset or business. It refers to Order PO-1901, which found that the disclosure of the Ontario Realty Corporation's appraisal report pertaining to 12 cottage lots would undermine the ORC's position with any potential purchasers of the properties, as it would allow potential purchasers to use this information to the

detriment of the ORC when negotiating a price. The ministry states that this case demonstrates that the potential that information would be used to undermine a party's position in sales negotiations is a factor to be considered when deciding whether such information should be disclosed. It then states that in this appeal "a prospective purchaser or competing business would be able to deduce both the revenue and profitability of a third party over multiple years. Knowledge of a business' income stream and commercial viability would inform the purchaser's valuation of the business and offer price."

[62] The affected parties' representations in support of their position that the harms in section 17(1)(a) would result from disclosure can be summarized as follows:

- The funeral services business in Ontario is becoming very competitive.
- The sole purpose of a request of this nature would be to target other businesses.
- The number of funerals each funeral home performs each year has historically been a "closely guarded trade secret."
- Without knowing why the information is requested, the request is perceived as a threat.
- Some of the affected parties have been targeted by large corporations in the past, which had specific details about the targeted company. This results in extreme caution when providing information to others about any aspect of the business.
- The information will be used by business interests against the affected parties (based on past experience and on the new *Funeral Services and Cemetery Act*).
- A competing party could use the information to create a marketing campaign, pricing structure, service offerings, merchandising specifics and/or affiliate programs based on the information.
- The affected parties could be specifically targeted, as parties could be positioned to directly compete with a party supplying the information, resulting in undue loss or gain.

Analysis and findings

[63] In the circumstances, I find that I have not been provided with sufficiently "detailed and convincing" evidence that disclosure of the record at issue could reasonably be expected to give rise to the harm in section 17(1)(a) of the *Act*. Although I accept that the funeral services industry is competitive, I have not been provided with sufficient evidence to satisfy me that the disclosure of simply the number of dispositions each home had in a given calendar year would result in the harms contemplated by section 17(1)(a).

[64] To begin, the ministry and the affected parties argue that the disclosure of the number of dispositions would reveal the homes "profitability" or financial vulnerability. Although I accept that the number of dispositions in a given year may reveal some information about a home's profitability or financial vulnerability, it is only one aspect of a home's financial information. Disclosure of the record would not reveal other financial information that relates directly to profitability or financial vulnerability such as operating expenses, overhead, capital assets, reserve funds, sales of other products and services (ie: prepaid services, etc), quality and cost of products sold, nature and level of services provided, etc.

[65] I also note that the ministry has argued that the number of dispositions "combined with other public information" may result in the disclosure of information about a home's profitability or vulnerability. The ministry does not describe what other public information this may be; however, I note that both the appellant and an affected party have indicated that information relating to the number of dispositions for each home can be obtained by monitoring death announcements in the newspaper. Other affected parties have stated that they have been targeted by large corporations in the past, which had "specific details about the targeted company." These representations suggest to me that information about the number of dispositions for a given funeral home may well be the sort of specific information that is publically available, though not in as concise and accurate a form as that which is found in the records.¹⁸

[66] I have made this finding after considering the ministry's substantial representations on the funeral home industry. Although I accept the ministry's position that certain factors including the nature of the industry, number and type of service provided, and the relative size of the parties in the industry may have a bearing on the application of section 17(1), I must consider all of the factors in determining whether the harms in section 17(1) are made out. In this case, because the only information at issue is the number of dispositions for a home for a given year, and no other information about each of the homes, I am not satisfied that the harms in section 17(1)(a) are established, notwithstanding some of the factors identified by the ministry.

[67] Accordingly, I find that the record does not qualify for exemption under section 17(1)(a).

Section 17(1)(c)

[68] As set out above, this section states that a head shall refuse to disclose a record where the disclosure could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

¹⁸ Under my discussion of part one of the test, above, I rejected the argument put forward by one of the third parties that the number of dispositions for each home is a "closely guarded trade secret."

[69] The ministry submits that disclosing the record would create undue loss for many of the affected parties and would create undue gain for several of their competitors. It states:

In ... Order PO-2786 [concerning documents related to ethanol production and manufacturing], the IPC found that the disclosure of information that would allow a party to use their industry experience to determine an affected party's financial data and revealed their current level of profitability also satisfied the test for harm under subsection 17(1)(c), as noted in paragraph 63.

[70] The ministry then reiterates that the funeral services industry is essentially a single service industry, and that this fact should inform the evaluation of whether this disclosure is likely to result in undue loss or gain to a third party. It submits that undue loss and undue gain is likely to occur if this information is disclosed, as "it provides a very accurate method of estimating the profitability of industry competitors and would lead large third parties with the financial capabilities to attempt to leverage this information in contractual negotiations with smaller operators."

[71] The ministry then again states that this office has found that the relative size of the parties can be a relevant factor in determining whether disclosure could reasonably be expected to significantly result in undue loss or gain under subsection 17(1)(c), and that:

... In the present case, the difference in size between the parties will almost certainly lead the larger competitors within the industry to attempt to utilize this information for their advantage. Given that there are limited opportunities to increase the size of the market, a funeral service provider will focus their expenditures on attempting to increase their market share by purchasing competitors or acquiring their market-share.

[72] Lastly, the ministry again refers to the representations of an affected party that was targeted in the past, and states that this is evidence of the competitive nature of the industry, and gives rise to a reasonable expectation that the disclosure of information contained in the record "could result in undue loss for any number of smaller competitors within the industry that do not have the financial resources to withstand the operational and pricing strategies that could be employed against them by larger organizations in the industry."

[73] The representations of the affected parties are summarized above. With respect to the harm under section 17(1)(c), the affected parties state that they "could be specifically targeted, as parties could be positioned to directly compete with a party supplying the information, resulting in undue loss or gain."

Finding

[74] In the circumstances, I find that I have not been provided with sufficiently “detailed and convincing” evidence that disclosure of the information in the record could reasonably be expected to give rise to the harms outlined in section 17(1)(c) of the *Act*. The essence of the representations in support of this exemption is that, given the nature of the industry, (single product, competitive, and involving parties of differing sizes), and the concern that information about productivity and financial vulnerability might be determinable as a result of disclosure, certain parties could be targeted.

[75] Similar to my finding under section 17(1)(a), above, I am not satisfied that the disclosure of the information in the record, which only relates to the number of dispositions for a home in a calendar year, would result in the section 17(1)(c) harms. As I found above, the number of dispositions in a given year it is only one aspect of a home’s financial information. In the circumstances, I have not been provided with sufficient evidence to support a finding that disclosure of the records would result in the harm set out in section 17(1)(c).

[76] In summary, I find that part three of the test for the application of sections 17(1)(a) and/or (c) has not been met, and that the information at issue is therefore not exempt under section 17(1) of the *Act*.

Issue B: Does the record contain “personal information” as defined in section 2(1)?

[77] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,

- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[78] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.¹⁹

[79] Section (2.1) also relates to the definition of personal information. It states:

Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[80] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.²⁰ Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.²¹

Representations and findings

[81] One of the affected parties provided representations in support of the argument that the information in the record contains the personal information of identifiable

¹⁹ Order 11.

²⁰ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

²¹ Orders P-1409, R-980015, PO-2225 and MO-2344.

individuals. This party argues that disclosure of the record could allow parties to “extrapolate” the family and personal incomes of identifiable individuals.

[82] The affected party states that disclosure of the number of dispositions for certain funeral homes could be combined with the average cost of a funeral service and the number of employees at a home to calculate the personal incomes of funeral home owners and their employees.

[83] On my review of the information at issue and the representations of the affected party, I am not satisfied that the disclosure of the information at issue would disclose the personal information of any identifiable individual. The information at issue is simply the number of dispositions for each named funeral home for the identified calendar years. It does not contain any other information about the funeral homes, nor does it include any information about revenues, expenses, number of employees, wage rates, profit or profit sharing percentages. In these circumstances, I find that the withheld information does not contain the personal information of any identifiable individuals as defined in section 2(1) of the *Act*, nor would any such information be revealed by the disclosure of the record.

[84] As the personal privacy exemption in section 21(1) of the *Act* can only apply to information that is the personal information of an identifiable individual, this section cannot apply to the information at issue in this appeal.

ORDER:

1. I do not uphold the ministry’s decision to deny access to the requested record.
2. I order the ministry to provide the appellant with the record by sending him a copy by **July 31, 2014** but not before **July 28, 2014**.

Original Signed By: _____
Frank DeVries
Adjudicator

June 25, 2014