

## Notice of Decision and Reasons for Decision

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Applicant:	'DA1'
Agency:	Australian Grand Prix Corporation
Decision date:	13 May 2021
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'DA1' and <i>Australian Grand Prix Corporation</i> (Freedom of Information) [2021] VICmr 128 (13 May 2021)

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FREEDOM OF INFORMATION – Australian Formula 1 Grand Prix – tickets sold for grandstand, corporate facilities and general admission – tickets sold to international and interstate visitors – section 19 – fresh decision

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

### Notice of Decision

I have conducted a review under section 49F of the Agency's fresh decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request differs from the Agency's decision.

I am satisfied the documents are not exempt from release under section 34(4)(a)(ii) and are to be released to the Applicant in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to each document.

My reasons for decision follow.

**Joanne Kummrow**

Public Access Deputy Commissioner

13 May 2021

## Reasons for Decision

### Background to review

1. The Applicant made a request to the Agency seeking access to the following documents:

The AGPC [Australian Grand Prix Corporation] has given [the Applicant] the number of grandstand and corporate boxes. In the public interest we also seek documents relating to F1 grand prix ticket sales for the years [time period] as follows:

1. The number of tickets sold in the grandstand, corporate facilities and general admission categories
2. The amount of cash revenue through tickets sold
3. The number of free tickets issued
4. The number of tickets sold to international and interstate visitors through the AGPC's ticketing agent.

2. In its decision, the Agency provided the Applicant a document containing the information sought in relation to points 2 and 3 of the Applicant's request. The Agency decided documents in response to points 1 and 4, which it produced in accordance with section 19, are exempt under section 34(4)(a)(ii).

3. Section 19 states:

- (1) Where—
  - (a) a request is duly made to an agency;
  - (b) it appears from the request that the desire of the applicant is for information that is not available in discrete form in documents of the agency; and
  - (c) the agency could produce a written document containing the information in discrete form by—
    - (i) the use of a computer or other equipment that is ordinarily available to the agency for retrieving or collating stored information; or
    - (ii) the making of a transcript from a sound recording held in the agency— the agency shall deal with the request as if it were a request for access to a written document so produced and containing that information and, for that purpose, this Act applies as if the agency had such a document in its possession.

4. The Agency's decision letter sets out the reasons for its decision.

### Review

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access to the requested documents.
6. During the review, the Applicant agreed to receive aggregated data for tickets sold to interstate and international visitors.

### Fresh decision made by Agency

7. Section 49M(1) permits an agency to make a fresh decision on an FOI request during a review.
8. On [date], the Agency made a fresh decision in relation to the [year] and [year] data for point 4 of the Applicant's request, and notified the Applicant in its decision letter that the requested documents do not exist and cannot be produced under section 19. The Agency did not address point 1 or the [year] data in relation to point 4 in its fresh decision.

9. The Applicant did not agree with the Agency's fresh decision.
10. During the review, the Agency subsequently determined it could produce documents in relation to points 1 and 4 of the Applicant's request in accordance with section 19.
11. I have examined copies of the documents subject to review.
12. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
13. I have considered all communications received from the parties, including:
  - (a) the Agency's decision on the FOI request; and
  - (b) all correspondence between OVIC, the Agency and the Applicant.
14. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.
15. I note Parliament's intention the FOI Act must be interpreted so as to further the object of the Act and any discretions conferred by the Act must be exercised, as far as possible, so as to facilitate and promote the disclosure of information in a timely manner and at the lowest reasonable cost.

#### **Preliminary view**

16. On [date], the Agency was provided with a preliminary view that there is insufficient evidence to establish disclosure of the figures for international and interstate ticket sales for the relevant periods would be likely to expose the Agency unreasonably to disadvantage for the purpose of section 34(4)(a)(ii).
17. On [date], the Agency responded that it continued to consider the documents are exempt from release under section 34(4)(a)(ii). The Agency's submission is set out below.

#### **Are the documents exempt under section 34(4)(a)(ii)?**

18. Section 34(4)(a)(ii) provides a document is an exempt document if it contains, 'in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that would if disclosed under this Act be likely to expose the agency unreasonably to disadvantage'.
19. Therefore, I must be satisfied:
  - (a) the Agency is engaged in trade or commerce;
  - (b) the documents contain information of a business, commercial or financial nature; and
  - (c) the release of the documents would expose the Agency unreasonably to disadvantage.

#### ***Is the Agency engaged in trade or commerce?***

20. The Victorian Civil and Administrative Tribunal (**VCAT**) has held 'the terms 'trade' and 'commerce' are not words of art; rather they are expressions of fact and terms of common knowledge'. Further,

VCAT has adopted the view of the Federal Court of Australia that these terms are 'of the widest import'.<sup>1</sup>

*Australian Grands Prix Corporation*

21. The Agency is a statutory corporation established under the *Australian Grands Prix Act 1994* (Vic) (the **GP Act**). Its functions are set out in section 20 of the GP Act:
- (a) to negotiate, enter into and vary agreements under which Formula One events are held;
  - (b) to undertake and facilitate the organisation, conduct, management and promotion of Formula One events and Australian Motorcycle Grand Prix events;
  - (c) to establish at Albert Park a temporary motor racing circuit and supporting facilities for Formula One events;
  - (d) to do all other things necessary for or in connection with the conduct and financial and commercial management of each Formula One event promoted by the Corporation;
  - (e) with the consent of the Minister, to negotiate and enter into an agreement for the holding of, and to undertake the organisation, conduct, management and promotion of, a motor sport event approved by the Minister;
  - (f) such other functions as are conferred on the Corporation under this Act or any other Act.
22. Given the functions of the Agency, I accept it is engaged in trade or commerce for the purposes of the FOI Act and in the context of the documents requested in the Applicant's FOI request.

***Do the documents contain information of a business, commercial or financial nature?***

23. Having reviewed the content of the documents and considered their context, I am satisfied the documents contain information of a business or commercial nature.

***Would disclosure of the documents expose the Agency unreasonably to disadvantage?***

24. In my view, section 34(4)(ii) contemplates disclosure of a document under the FOI Act may expose a government agency or statutory authority to a certain measure of disadvantage. The question to be considered is whether any such exposure would be unreasonable in the circumstances.

*Applicant's submission*

25. In summary, the Applicant submits:

We believe it is in the public interest for actual ticket sales to be disclosed, especially as the AGPC refuses to do an honest attendance count and Victorian taxpayers are the major funders of this event.  
...

Other events, and even the government of the day, have revealed, for example:

- 1. The number of interstate tickets sold for the AFL grand final, especially when a non-Victorian team is one of the finalists and,
- 2. The percentage of interstate and overseas tickets sold. For example, for the UFC193 event at Etihad stadium in 2015 the stadium's CEO, Paul Sergeant was quoted as saying, "43% of tickets sold were purchased from either interstate or overseas visitors". I seem to remember the Victorian tourism minister giving actual visitor numbers for that event.

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<sup>1</sup> *Re Ku-ring-gai Co-op Building Society Ltd* (No 12) (1978) 36 FLR 134 (at 167).

The AGPC has long claimed its F1 event is Australia's largest single-day sporting event and even second to the Olympics in corporate attendees. It should not be allowed to make such claims without doing accurate attendance counts - but it does and is never challenged.

...

This agency is effectively employed by Victorian taxpayers (we have already contributed in excess of one billion dollars to keep it afloat) and should be accountable to us, the Victorian public.

26. The Agency relies on a 2008 VCAT decision<sup>2</sup> (**VCAT Decision**), in which the Tribunal conducted a review of an Agency decision refusing access under section 34(4)(ii)(a) to the same documents sought by the Applicant in this matter. The Agency submits the documents in this review remain exempt for the same reasons as set out in the VCAT Decision.
27. In the VCAT Decision, a Tribunal judicial member accepted the evidence of the Agency's Chief Executive Officer that disclosure of the documents 'would be likely to disadvantage the Respondent in the ways advanced by the Respondent's witness'.<sup>3</sup>
28. In summary, the Agency's Chief Executive Officer stated:<sup>4</sup>
  53. He said that the Respondent was very concerned to protect all information which could be used to make calculation of attendances and ticket sales at the Grand Prix.
  54. He said that ticketing information is treated as highly confidential information for all large public entertainment events. This includes gross ticket sales, and the information as to how many tickets are purchased in various categories, and the particular events for which various proportions of tickets are purchased.
  - 55.. This is because it is this information which provides the clue as to how successful or unsuccessful the event's marketing and sales strategy has been. Any given event will seek to attract custom by marketing in what it believes to be the most effective way. It may advertise to a particular demographic group – for instance, to young men who love race cars or, alternatively, to families with young children. It is not until the ticket sales are analysed after the event that the success or failure in marketing to various groups can be evaluated, and patterns of success or failure of marketing strategies established.
  56. As well as this information being vital for advertising and marketing of ticket purchases, it was said it is also vital information to use in attracting sponsors to place advertising at the event. Sponsors need to know how many individuals will see their sponsorship banners and advertising material. A sponsor will be less likely to be attracted if the numbers of people attending the event (and therefore seeing and being influenced by their signs or displays) are small. In negotiating with sponsors, the Respondent says that both the sponsor and the Respondent make offers and counter-offers reflecting what they perceive to be the popularity and prestige of the event.
  57. Further, companies considering buying Corporate tickets need to be able to see how sought after these tickets are. Is a gift to a valued client of a ticket in a corporate box to the Grand Prix attractive? There is no point in a business buying tickets for corporate entertainment at the Grand Prix if attendance at the Grand Prix is not valued by the clients those businesses are trying to impress.
  58. It is thus not just actual tickets sold which is essential marketing information. In the case of tickets sold over four days, it is necessary to estimate how many persons will use the ticket, and over how many days.
  59. Estimating actual attendances at an event such as the Grand Prix is more difficult than one might at first think. Far different results may be obtained in various scenarios. For instance, a person may buy a 4-day ticket but only use it to attend once. Alternatively a person may buy a 4-day ticket and share it with three friends, so each of four friends attends on one day. Or a person may buy a 4-day ticket and that same person attends for all four days.

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<sup>2</sup> [2008] VCAT 168.

<sup>3</sup> Ibid at [74].

<sup>4</sup> Ibid at [53]-[65].

60. So, in the absence of actual figures of attendance and categories of attendance, assumptions need to be made about the likelihood of use of tickets purchased. Calculations may vary widely depending on exactly what those assumptions are.

61. Thus, the Respondent says that it will be greatly disadvantaged if the Applicant, or any competitor, is given access to documents which will enable the Applicant to attempt its own estimates of actual ticket sales, or to analyse the way in which ticket sales information is treated by the Respondent in its various financial statements and projections. The release of this information may harm actual ticket sales. It will also place the Respondent at a disadvantage in trying to extract the most favourable terms from potential sponsors.

62. The Respondent's final submissions set out three categories of the exempt information:-

1. Total ticket sales information broken down into Grandstand, Corporate and General Admission ticket sales.
2. Number of tickets sold to interstate and overseas visitors.
3. The number of free tickets issued for the event.

#### 1. Ticket Sales

63. The Respondent says that disclosure of ticket sales information would be likely to unreasonably expose the Respondent to disadvantage. Ticket sales information is a particular type of intellectual information capable of being used to assess the success of marketing strategies. It is not generally released into the marketplace. The only examples of release have been in relation to the Adelaide Grand Prix – shortly before the event was lost to Melbourne. It is highly sought after information because of its ability to signal trends and to confirm commercial success.

#### 2. Interstate and Overseas Patrons

64. The Respondent says that disclosure of the number of tickets sold interstate and overseas would be likely to unreasonably expose the Respondent to disadvantage. Attraction of sponsors between high profile events depends upon establishing the profile. Part of a profile is overseas recognition of the event. The evidence of the Respondent is that there is no reliable way of estimating the proportion of overseas and interstate visitors to the event, as those statistics cannot reliably be captured. Release of incomplete figures, providing a low impression of interstate or overseas interest, would be damaging to the Respondent in the marketplace.

#### 3. Free Tickets

65. The Respondent says that the release of the number of free tickets would be likely to unreasonably expose the Respondent to disadvantage. An event which relied on a large number of give-away tickets to give an impression of popularity would be seen within the marketplace to be unsuccessful. The Respondent gave evidence that there is no breakdown in the documents in dispute of different categories of free tickets. Tickets counted as free include tickets given in exchange for services, such as to contractors, sponsors, tickets giving admission to tradesmen working at the event, and various other categories of non-paying ticket, as well as free tickets in the usual sense of tickets given without obligation, such as tickets to charities. Therefore the Respondent argued that if the gross number of free tickets was to be released this would give the impression that the event was being artificially enhanced by giveaway tickets, and so reduce the value of tickets sold and the likelihood of sponsorship.

59. In its submission to OVIC, the Agency submits:

As for the view that the Information Commissioner is not “bound” to follow a VCAT decision, AGPC respectfully contends that VCAT decisions, particularly those of its judicial members, are deserving of close consideration. Here, the FOI request has been made ... in respect of the same type of information found by Judge Harbison to be exempt under section 34(4)(a)(ii). Thus, unless there is some basis to think that there has been some material change since the VCAT decision, the same outcome should be reached here. Critically, however, there is no basis to think that there has been a change of that kind.

While the [VCAT Decision] was decided a number of years ago, its reasoning remains no less persuasive. Her Honour found (at [77]) that the ticketing information was “valuable intellectual property”. As such, releasing it into the public domain would “deprive the Respondent of a valuable asset”. More importantly, such disclosure would allow “all of the entities with which the Respondent must deal –

sponsors, competitors, corporate customers – access to data from which they can strengthen their bargaining position at the expense of the Respondent”.

Given these findings, her Honour had no difficulty in concluding that such disclosure would be likely to expose AGPC unreasonably to disadvantage. If her Honour’s reasons for that conclusion are considered concise, AGPC respectfully contends that her Honour’s concision simply reflects the obviousness of her conclusion.

In short, disclosure of the information sought here would be likely to expose AGPC to unreasonable disadvantage. That disadvantage concerns AGPC’s position in relation to its competitors, its sponsors (whose sponsorship partially relieves the burden of public funding), and those who might bid against AGPC for the future holding of the event. And that disadvantage would be unreasonable in all the circumstances, having regard to matters such as: (a) the public interest in government agencies operating in trade and commerce being able to compete effectively and efficiently; (b) the public interest in the AGPC being as commercially successful as possible given the greater its success, the less public support it requires; and (c) the public interest in a government agency in trade and commerce being able to protect valuable information that it has accrued as a result of its operations.

Lastly, your [preliminary view] suggests that if the ticket sales figures “are lower than expected”, that may support disclosure of such information being in the public interest. It is not clear how the figures in question relate to any particular expectation (or whose expectation). In any event, ticket sales are not to be equated with unique visitors, as the discussion in the [VCAT Decision] shows. Release of the information would just give rise to misleading or captious debate, which would not advance the public interest in any meaningful way. Indeed, such debate would be contrary to the public interest.

60. In undertaking a review under section 49F, I am required by section 49P to make a fresh or new decision. This means my review does not involve determining whether the Agency’s original decision is correct, but rather I am required to ensure my fresh decision is the ‘correct or preferable decision’.<sup>5</sup> This involves ensuring my decision is correctly made under the FOI Act and any other relevant applicable law in force at the time of making my fresh decision.
61. While a decision of VCAT should be carefully considered in the context of a current review matter before OVIC, the Information Commissioner and Public Access Deputy Commissioner, in independently discharging their statutory decision making functions under section 49 the FOI Act are not obliged to follow a previous decision of VCAT as legal precedent, in the same way a VCAT member is not obliged to do so.
62. Therefore, it is necessary for me to be satisfied based on the information before me at the time of my decision that the disclosure of the documents would expose the Agency unreasonably to disadvantage.

***Would disclosure of the documents expose the Agency unreasonably to disadvantage?***

63. In relation to whether disclosure of the documents in the VCAT Decision would expose the Agency unreasonably to disadvantage, the Tribunal held:

75. I accept that the onus of proving unreasonable disadvantage lies on the Respondent. However, Mr Maskiell has provided clear and logical reasons for the claimed disadvantage. He presented as an honest witness. He gave persuasive evidence that this information was part of the Respondent’s intellectual property – its “know-how”, and that this intellectual property was a very valuable commodity.

76. The Applicant suggested that any attempt to use the information by a competitor to attract sponsors or corporate clients away from the Grand Prix could easily be countered by advertising.

77. In my view the Applicant failed to come to grips with the issues of competition raised in the Respondent’s witness statements. If, as I accept, this information is valuable intellectual property, then its release into the public domain deprives the Respondent of a valuable asset. It allows all of the

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<sup>5</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 591.

entities with which the Respondent must deal – sponsors, competitors, corporate customers – access to data from which they can strengthen their bargaining position at the expense of the Respondent. This disadvantage cannot be countered by advertising or public relations.

78. In my view the Respondent has established that it will be unreasonably disadvantaged in the marketplace should the documents in dispute be released.

79. I might say, that although the matter was not argued in this case, it is clear to me that release of this information to the Applicant will mean its release into the public domain. The Applicant wishes to have the information so that it can be disseminated throughout the community – to the traders of Albert Park, and to the public whose funds underwrite the event.

64. I also acknowledge the VCAT Decision accepted in relation to the public interest override under section 50(4):

The public has a clear interest in having the funding of the event scrutinised by an independent authority. However, that interest is well satisfied in this case. The Respondent is bound by the *Financial Management Act 1994* to publish audited annual reports. Its affairs are subject to the scrutiny of the Auditor-General. Further, section 25 of the *Australian Grand Prix Act 1994*, makes detailed provision for the preparation of an annual business plan and its detailed scrutiny before approval by Government. There was no evidence presented to me, apart from its assertion as a fact in the Applicant's submission, that there is "ample evidence in the public domain that the Respondent has a history of not being transparent and accountable".

65. I have carefully considered the submissions provided by the Agency and the Applicant in relation to this review, and the evidence before VCAT, as discussed in the VCAT Decision, and Her Honour's findings.
66. To be satisfied disclosure of a document would be likely to expose an undertaking unreasonably to disadvantage, it is necessary for an agency to establish the requirements for the exemption under section 34(4)(ii)(a) apply.
67. I acknowledge '[s]ecuring, creating, staging and then retaining major events is a global, highly competitive business'.<sup>6</sup> I also accept the Agency's commercial success is in the public interest, and the information in the documents is valuable with respect of its operations. However, based on the information before me, I am not satisfied the Agency has objectively demonstrated the specific commercial harm that would be caused by disclosure of the documents. Further, while I accept the Agency may be exposed to some measure of competitive disadvantage, I am unable to be satisfied, based on the information before me, that disclosure of the documents would expose the Agency *unreasonably* to disadvantage.
68. In my view, the evidence presented by the Agency to VCAT and relied upon in this matter, relies on the impact of disclosure as being detrimental to the competitive position of the Agency and the Australian Grand Prix due to the importance of the 'information being vital for advertising and marketing of ticket purchases' and 'attracting sponsors to place advertising at the event'.
69. I appreciate the Agency does not wish for the requested information to be disclosed to the Applicant. However, there is no information before me to objectively establish what commercial or financial harm the Agency would reasonably be exposed to should the documents be released and how any resultant exposure to disadvantage would be unreasonable.
70. With respect, the VCAT Decision was determined in 2008, more than 12 years ago. I consider community expectations and standards regarding transparency and public accountability in the expenditure of public funds, including in the underwriting of a statutory corporation with

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<sup>6</sup> Victorian Auditor General, *State Investment in Major Events* (May 2007) at <<https://www.parliament.vic.gov.au/papers/govpub/VPARL2006-10No14.pdf>>.



commercially focused functions operating in a competitive environment, have increased in the intervening period. In this case, the information requested by the Applicant is concerned with the sale of event tickets and the number of ticket sales purchased by or for interstate and international participants. I do not consider the nature of this information and its disclosure would result in the Agency being exposed unreasonably to disadvantage.

71. I note the Agency's submission disclosure of the documents would be unreasonable as it would 'give rise to misleading or captious debate', and such debate would be contrary to the public interest. In my view, such arguments underestimate the ability of the public to discuss government information and decision making meaningfully and particularly in the context of public funding or underwriting of major events.
72. While not a determinative factor in my decision, the cancellation of the 2020 Australian Grand Prix and the rescheduling of the race until later in 2021 due to the restrictions on international visitors entering Australia due to the COVID-19 pandemic, which are anticipated to continue until at least mid-2022, has had a significant impact on the holding of the Australian Grand Prix and many other major sporting events. Therefore, the release of the requested documents at this time, and the nexus between their disclosure and any exposure of the Agency to disadvantage, needs to be considered in the context of the challenging global and national environment arising from the impact of the pandemic, such that the concerns relied on by the Agency in the VCAT decision will, in my view, have been superseded by more pressing concerns.
73. Finally, in releasing the requested documents, in the event the Agency is concerned that the information may be misunderstood or misinterpreted, it is open to the Agency to provide an explanation as to the accuracy and any limitations on the data.
74. Accordingly, I am not satisfied the documents are exempt under section 34(4)(a)(ii).

## **Conclusion**

75. On the information before me, I am not satisfied the requested documents are exempt under section 34(4)(ii)(a). Therefore, the documents created by the Agency under section 19 which address points 1 and 4 in the Applicant's request are to be released in full.

## **Review rights**

76. If either party to this review is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.<sup>7</sup>
77. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>8</sup>
78. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>9</sup>
79. Information about how to apply to VCAT is available online at [www.vcat.vic.gov.au](http://www.vcat.vic.gov.au). Alternatively, VCAT may be contacted by email at [admin@vcat.vic.gov.au](mailto:admin@vcat.vic.gov.au) or by telephone on 1300 018 228.
80. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.<sup>10</sup>

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<sup>7</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>8</sup> Section 52(5).

<sup>9</sup> Section 52(9).

<sup>10</sup> Sections 50(3F) and (3FA).

***When this decision takes effect***

81. My decision does not take effect until the Agency's 14 day review period expires.
82. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

Document No.	Date of Document	Document Description	No. of Pages	Agency Decision	OVIC Decision
1.	Created under section 19 and provided to OVIC on [date]	The number of tickets sold for grandstand, corporate facilities and general admission categories for the years [year, year, year]	1	<b>Refused in full</b> Section 34(4)(a)(ii)	<b>Release in full</b>
2.	[Multiple years]	Amount of case revenue	1	Release in full	<b>Not subject to review</b>
3.	[Multiple years]	Number of free tickets issued	1	Release in full	<b>Not subject to review</b>
4.	Created under section 19 and provided to OVIC on [date]	The number of tickets sold to international and interstate visitors through the AGPC's ticketing agent for [multiple years]	1	<b>Refused in full</b> Section 34(4)(a)(ii)	<b>Release in full</b>