

## Notice of Decision and Reasons for Decision

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|---------------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| Applicant:                            | 'FS8'                                                                                                                 |
| Agency:                               | Department of Jobs, Skills, Industry and Regions                                                                      |
| Decision date:                        | 6 December 2024                                                                                                       |
| Exemptions and provisions considered: | Sections 33(1), 35(1)(a), 34(4)(a)(ii), 25                                                                            |
| Citation:                             | 'FS8' and Department of Jobs, Skills, Industry and Regions (Freedom of Information) [2024] VICmr 52 (6 December 2024) |

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FREEDOM OF INFORMATION – Big Bash League game cancellation – Briefing note – Executive level staff – information communicated in confidence – information not in the nature of advice

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 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 and more information is to be released. I am satisfied Document 2a is not exempt from release under section 35(1)(a) and that the names of Executive level staff are not exempt from release under section 33(1).

Accordingly, Documents 1 and 2 are to remain released in accordance with the Agency's decision and Document 2a is to be released in part in accordance with the directions in the Schedule of Documents in **Annexure 1**.

Please refer to pages 9 to 10 for information about review rights through the Victorian Civil and Administrative Tribunal (**VCAT**).

My reasons for decision follow.

Penny Eastman  
**Public Access Deputy Commissioner**

6 December 2024

## Reasons for Decision

### Background to review

1. On 10 December 2023, the Big Bash League game between the Melbourne Renegades and Perth Scorchers was abandoned shortly after starting, due to the condition of the pitch.<sup>1</sup>
2. The Applicant's request was for access to:

Any correspondence involving the Kardinia Park Stadium trust and the Department of Jobs, Skills, Industry and Regions (DJSIR) regarding a cancelled Big Bash game at GMHBA stadium on December 10, 2023. A subsequent investigation and any discussion regarding compensation.
3. The Applicant excluded draft documents, duplicate documents, and personal affairs information of third parties aside from the names of Executive level staff from the scope of their request.
4. The Agency identified two documents falling within the terms of the Applicant's request, comprising of two emails. Both emails were released to the Applicant in part with irrelevant personal affairs information deleted, and an attachment to one of the emails was refused in full under section 35(1)(a). The Agency's decision letter sets out the reasons for its decision.

### Review application

5. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
6. The Applicant seeks review of the Agency's refusal to grant access to Document 2a, which is an attachment to Document 2.
7. I have examined a copy of the document subject to review.
8. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
9. I have considered relevant communications and submissions received from the parties.
10. 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.
11. 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.

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<sup>1</sup> Jon Healy, 'Big Bash League game between Melbourne Renegades and Perth Scorchers called off due to Geelong pitch', *Australian Broadcasting Corporation* (online, 10 December 2023) <<https://www.abc.net.au/news/2023-12-10/big-bash-league-game-renegades-scorchers-abandoned-geelong-pitch/103211702>>.

12. In conducting a review under section 49F, section 49P requires that I make a new or ‘fresh decision’. Therefore, my review does not involve determining whether the Agency’s decision is correct, but rather requires my fresh decision to be the ‘correct or preferable decision’.<sup>2</sup> This involves ensuring my decision is correctly made under the FOI Act and any other applicable law in force at the time of my decision.

## Review of exemptions

### *Section 35(1)(a) – information would be exempt if generated by an agency*

13. A document may be considered exempt under section 35(1)(a) if two conditions are satisfied:
  - (a) disclosure would divulge information or matter:
    - i. communicated in confidence;
    - ii. by or on behalf of a person or a government to an agency or a Minister; and
  - (b) the information would be exempt matter if it were generated by an agency or a Minister.
14. The Agency exempted Document 2a in full under section 35(1)(a).

### *Was the information communicated in confidence to the Agency?*

15. Whether information was communicated in confidence is a question of fact,<sup>3</sup> determined from the perspective of the communicator.<sup>4</sup>
16. Confidentiality can be express or implied from the circumstances.<sup>5</sup>
17. Document 2a is titled ‘ministerial briefing note’ on a Kardinia Park Stadium Trust (KPST) letterhead. It was attached to Document 2, which is an email from KPST to the Agency regarding the cancellation of the Big Bash League match on 10 December 2023. Document 2 indicates that the briefing note was shared with the Minister’s Office.
18. There is nothing on the face of Documents 2 or 2a that expresses confidentiality. However, the Agency’s decision letter states that it consulted KPST which advised that Document 2a was provided confidentially and that it contains internal advice, opinion and recommendations that if released would be detrimental to the public interest due to the ongoing nature of investigations around the cancellation of the match. A copy of KPST’s consultation response was provided to OVIC during the review.
19. Given the circumstances that led to the creation of the document and KPST’s consultation response, I am satisfied that there would have been an expectation of confidentiality.

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<sup>2</sup> *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at [591].

<sup>3</sup> *Ryder v Booth* [1985] VR 869, 883.

<sup>4</sup> *Woodford v Ombudsman* [2001] VCAT 721, [95]; *XYZ v Victoria Police* [2010] VCAT 255, [265]; *Barling v Medical Board of Victoria* (1992) 5 VAR 542, 561-562.

<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255, [265].

*Would the information be exempt matter if it were generated by an agency or Minister?*

20. The second condition of section 35(1)(a) is that the information must be exempt under one of the other exemptions in Part IV, if the information had been generated by an agency, rather than communicated to the agency from an external entity.

21. In this matter, the document was communicated from one agency to another. In *Shaw v Department of Justice and Regulation*, VCAT stated:

While the cases which have considered section 35(1)(a) of the FOI Act appear to have related to bodies outside the concept of an 'agency' for the FOI Act, there is no reason why it cannot apply to confidential information communicated by 'a person' (within one agency) to 'an agency' (in this case, the Department), where it would be exempt if generated by 'an agency' (again, the Department) and otherwise meets the requirements of section 30(1) of the FOI Act.<sup>6</sup>

22. As stated above, KPST considered disclosure of the document would be 'detrimental to the public interest due to the ongoing nature of investigations around the cancellation of the match'. I note KPST also raised that disclosure of the document could expose it to commercial or financial disadvantage. Therefore, for the purposes of section 35(1)(a), I will consider if the document would be exempt under sections 30(1) and 34(4)(a)(ii) if it were generated by an agency.

#### Section 30(1)

23. Section 30(1) provides that a document is exempt if:

- (a) it discloses matter in the nature of opinion, advice, or recommendation prepared by an officer, or discloses consultation or deliberation between officers of the agency, Ministers, or an officer and a Minister; and
- (b) its disclosure would be contrary to the public interest.

24. When section 30(1) is being considered, for the purpose of applying section 35(1)(a), the person who communicated the information in confidence is 'deemed' to be an officer of the agency to which the information was communicated.<sup>7</sup>

25. The briefing provides advice to the Minister on what occurred, what steps were taken afterwards, and what KPST anticipated may occur because of the incident.

26. For the purposes of section 30(1), 'advice' must be something more than mere 'informing' or 'recounting' of events that have occurred.<sup>8</sup>

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<sup>6</sup> (Review and Regulation) [2018] VCAT 2038, [49].

<sup>7</sup> *Casey CC v Environment Protection Authority (General)* [2010] VCAT 453, [28]. In this case the information was communicated by persons from a UK environmental agency to the EPA. See also, *Shaw v Department of Justice and Regulation* [2018] VCAT 2038, [49], where the information was communicated by officers from other departments to the Department.

<sup>8</sup> *Porter v Victoria Police* [2005] VCAT 962, [23]; *Baker v Department of Education and Training* [2005] VCAT 2263, [11].

27. As such, I consider most of Document 2a is not in the nature of advice, as it merely informs the Minister on what occurred and constitutes factual information excluded from the operation of section 30(1).<sup>9</sup>
28. However, there is one dot point where KPST anticipates what may occur in future, which I am satisfied is in the nature of advice.
29. There are many factors relevant to determining whether it would be contrary to the public interest to disclose a document or information.<sup>10</sup> Public interest factors are not a fixed, determinative set of criteria.<sup>11</sup> Rather, they are a list of matters that may be relevant. Each decision under the FOI Act balances these factors based on the unique circumstances of the matter.
30. Document 2a was created shortly after the match was cancelled. The content reflects what KPST anticipated could occur in future at the time the document was created. In my view, the situation has progressed substantially at the time of making my decision given the significant amount of time that has passed since the cancellation of the match. While the advice provided at the time may not reflect the current situation, I do not consider it would be contrary to the public interest to disclose just because it represents decision-making and deliberation shortly after the incident.
31. Further, I do not consider disclosure of this document would impact KPST's present position, including in relation to any current or potential legal or financial claims arising from the incident. This is due to the time that has passed and because, in my view, the content describes KPST's preliminary general approach only to handling the predicted situation, rather than a detailed strategy.
32. As such, I am satisfied Document 2a would not be exempt from release under section 30(1) if it were generated by the Agency.

#### Section 34(4)(a)(ii)

33. A document or information is exempt under section 34(4)(a)(ii) if three conditions are satisfied:
  - (a) the agency is engaged in trade or commerce; and
  - (b) the document contains information of a business, commercial or financial nature; and
  - (c) disclosure of the information would be likely to expose the agency unreasonably to disadvantage.
34. I accept KPST is engaged in trade and commerce with respect to its role to administer, promote and manage the GMHBA stadium.

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<sup>9</sup> Section 30(3).

<sup>10</sup> For example, see *Coulson v Department of Premier and Cabinet* [2018] VCAT 229, [25]; *Hulls v Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 488; *Secretary to Department of Justice v Osland* (2007) 26 VAR 425, [77].

<sup>11</sup> *Landes v Vic Roads* [2009] VCAT 2403, [46].

35. I also accept the document contains information of a business nature, as it concerns the circumstances in which a Big Bash League match was cancelled, which would have involved contractual relationships with other commercial entities.
36. Whether disclosure is likely to expose KPST unreasonably to disadvantage depends on the particular facts and circumstances of the matter, considering the consequences that are likely to follow from disclosure of the information.
37. The test is one of likelihood rather than certainty. It means ‘probable, such as well might happen or be true’.<sup>12</sup>
38. I am not satisfied that disclosure would be likely to expose KPST unreasonably to disadvantage for the following reasons:
  - (a) I do not consider disclosure of this document would impact KPST’s present position, including in relation to any current or potential legal and financial claims arising from the incident, given the time that has passed and because the document does not disclose specific information about how it would respond to any potential claims.
  - (b) I do not consider disclosing information that concerns KPST’s contracted service provider would be likely to expose KPST unreasonably to disadvantage, particularly, as the document factually recounts actions that were taken by the contracted service provider. I am not satisfied that their ongoing relationship with the contracted service provider is likely to be impacted by the release of the document.
  - (c) I do not consider that disclosure of the document will have any impact on KPST’s future tendering for contracted service providers. The document is focused on recounting the incident that occurred, and it is unlikely that it would have any relevance to any future tendering processes for third party contractors.
  - (d) I do not consider that disclosure of the document would impact KPST’s likelihood of being outbid for future matches from Cricket Australia. Rather, while the incident that occurred may impact KPST’s relationship with Cricket Australia and the likelihood of future contractual agreements specifically with Cricket Australia, I do not consider the information within the document is likely to cause KPST to be outbid by competitors for matches.
  - (e) The document does not contain information that could be used by KPST’s competitors to their commercial disadvantage.
39. For the above reasons, I am satisfied that the document would not be exempt from release under section 34(4)(a)(ii) if it were generated by an agency.
40. Therefore, as the second limb of section 35(1)(a) is not met, Document 2a is not exempt from release under section 35(1)(a).

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<sup>12</sup> *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

***Section 33(1) – Documents affecting personal privacy of third parties***

41. As I have decided the document is not exempt from release under section 35(1)(a), I have also considered the application of section 33(1).
42. A document or information is exempt under section 33(1) if two conditions are satisfied:
- (a) the document or information relates to the ‘personal affairs’ of a natural person (living or deceased); and
  - (b) disclosure of that personal affairs information is unreasonable in all the circumstances.

*Does the document contain personal affairs information of individuals other than the Applicant?*

43. The document contains the names, signatures and position titles of Executive level staff. I note the Applicant only seeks access to names of Executive level staff.

*Would disclosure of the personal affairs information be unreasonable?*

44. The concept of ‘unreasonable disclosure’ involves balancing the public interest in the disclosure of official information with the personal interest in privacy in the particular circumstances of a matter.
45. In *Victoria Police v Marke*,<sup>13</sup> the Victorian Court of Appeal held there is ‘no absolute bar to providing access to documents which relate to the personal affairs of others’. Further, the exemption under section 33(1) ‘arises only in cases of unreasonable disclosure’ and ‘[w]hat amounts to an unreasonable disclosure of someone’s personal affairs will necessarily vary from case to case’.<sup>14</sup> The Court further held, ‘[t]he protection of privacy, which lies at the heart of [section] 33(1), is an important right that the FOI Act properly protects. However, an individual’s privacy can be invaded by a lesser or greater degree’.<sup>15</sup>
46. In determining whether disclosure of the personal affairs information would be unreasonable in the circumstances, I have considered the following factors:<sup>16</sup>

(a) The nature of the personal affairs information

The personal affairs information is not sensitive in nature. The third parties are Executive level, and therefore, they have a greater level of accountability with respect to their actions undertaken as representatives of the KPST.

(b) The circumstances in which the information was obtained

The briefing was provided to the Agency on behalf of Executive level staff from KPST following the cancellation of the match. The briefing provides advice to the Minister on

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<sup>13</sup> [2008] VSCA 218 at [76].

<sup>14</sup> Ibid.

<sup>15</sup> Ibid at [79].

<sup>16</sup> OVIC FOI Guidelines – Section 33(1)

what occurred, what steps were taken afterwards, and what KPST anticipated may occur because of the incident.

(c) The extent to which the information is available to the public

The personal affairs information is publicly available on KPST's website, including its 2023-24 Annual Report.

(d) The Applicant's interest in the information

The Applicant is [...] interested in [...] the decision making in relation to the cancellation of the game.

(e) Whether any public or important interest would be promoted by release of the information

I do not consider there is a public interest in disclosing the personal affairs information in this matter.

(f) Whether the individuals to whom the information relates object, or would be likely to object, to the release of the information.

There is no information before me concerning the views of the third parties. While I consider they would likely object to the disclosure of the contents of the document, I do not consider they would object to disclosure of their personal affairs information given their seniority and that it is already publicly available.

(g) Whether disclosure of the information would or would be reasonably likely to endanger the life or physical safety of any person.<sup>17</sup>

There is no information before me to be satisfied that disclosure would or would be reasonably likely to endanger the life or physical safety of any person.

47. On balance of these factors, I am satisfied that disclosure of the personal affairs information would not be unreasonable in the circumstances. As such, it is not exempt from disclosure under section 33(1).

***Section 25 – Deletion of exempt or irrelevant information***

48. Section 25 requires an agency to grant access to an edited copy of a document where it is practicable to delete exempt or irrelevant information and the applicant agrees to receiving such a copy.
49. Determining what is 'practicable' requires consideration of the effort and editing involved in making the deletions 'from a resources point of view'<sup>18</sup> and the effectiveness of the deletions.

<sup>17</sup> Section 33(2A).

<sup>18</sup> *Mickelborough v Victoria Police (General)* [2009] VCAT 2786 at [31]; *The Herald and Weekly Times Pty Limited v The Office of the Premier (General)* [2012] VCAT 967 at [82].



50. Where deletions would render a document meaningless, they are not 'practicable' and release of the document is not required under section 25.<sup>19</sup>
51. The Applicant did not seek access to personal affairs information, except for the names of Executive level staff. Therefore, other personal affairs information in the document is irrelevant information that is to remain deleted.
52. I am satisfied it is practicable to edit the document to delete irrelevant information in accordance with section 25.

### Conclusion

53. On the information before me, I am satisfied Document 2a is not exempt from release under section 35(1)(a). I am also satisfied the names of Executive level staff are not exempt from release under section 33(1).
54. Accordingly, Document 2a is to be released in part in accordance with the directions in the Schedule of Documents in **Annexure 1**.
55. Documents 1 and 2 are to remain released in accordance with the Agency's original decision.

### Timeframe to seek a review of my decision

56. 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>20</sup>
57. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.<sup>21</sup>
58. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.<sup>22</sup>
59. 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.
60. 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>23</sup>

### Third party review rights

61. As I have determined to release documents that containing information about KPST, its contracted service provider, and personal affairs information of third parties, if practicable, I

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<sup>19</sup> *Honeywood v Department of Human Services* [2006] VCAT 2048 at [26]; *RFJ v Victoria Police FOI Division* (Review and Regulation) [2013] VCAT 1267 at [140], [155].

<sup>20</sup> The Applicant in section 50(1)(b) and the Agency in section 50(3D).

<sup>21</sup> Section 52(5).

<sup>22</sup> Section 52(9).

<sup>23</sup> Sections 50(3F) and 50(3FA).

am required to notify these parties of their right to seek review by VCAT of my decision within 60 days from the date they are given notice.<sup>24</sup>

62. In this case, I am satisfied it is practicable to notify these parties of their review rights. I have provided notification letters to the Agency with my decision which I request the Agency distribute to the third parties as soon as practicable.

**When this decision takes effect**

63. My decision does not take effect until the third parties' 60 day review period expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

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<sup>24</sup> Sections 49P(5), 50(3), 50(3AB) and 52(3).

## Annexure 1 – Schedule of Documents

| Document No. | Date of document | Document Description                             | No. of pages | Agency Decision                     | OVIC Decision                                                                                                                                    | OVIC Comments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
|--------------|------------------|--------------------------------------------------|--------------|-------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1            | [Date]           | Email chain                                      | 3            | Released in part<br>Section 25      | Not subject to review                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 2            | [Date]           | Email chain                                      | 2            | Released in part<br>Section 25      | Not subject to review                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 2a           | [Date]           | Ministerial briefing note attached to Document 2 | 3            | Refused in full<br>Section 35(1)(a) | Release in part<br>Section 25<br><br>The document is to be released, except for the position titles and signatures of the Executive level staff. | <p>Section 35(1)(a): I am not satisfied this document is exempt under section 35(1)(a) for the reasons provided in my decision, above.</p> <p>Section 33(1): I am not satisfied the names are exempt under section 33(1) for the reasons provided in my decision, above.</p> <p>Section 25: I am satisfied that the position titles and signatures are irrelevant personal affairs information. I am satisfied it is practicable to edit this document to delete irrelevant personal affairs information in accordance with section 25.</p> |