

Notice of Decision and Reasons for Decision

Applicant:	'FV2'
Agency:	Kardinia Park Stadium Trust
Decision date:	6 May 2025
Exemption considered:	Section 34(4)(a)(ii)
Citation:	'FV2' and Kardinia Park Stadium Trust (Freedom of Information) [2025] VICmr 20 (6 May 2025)

FREEDOM OF INFORMATION – Big Bash League – cancellation of sports match – correspondence between the Agency and external parties

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 is that section 34(4)(a)(ii) applies to the documents and no further information is to be released.

Please refer to the end of my decision 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 May 2025

Reasons for Decision

Background to review

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

Any correspondence between [the Agency] and [third parties] regarding an investigation into a cancelled Big Bash match in Geelong on December 10, 2023 and subsequent compensation.
2. The Agency identified 69 documents falling within the terms of the Applicant's request and refused access to 59 documents in full under sections 30(1) and 34(4)(a)(ii) and released ten documents in part with third party personal affairs information deleted. The Agency's decision letter sets out the reasons for its decision.

Review application

3. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
4. I have examined a copy of the documents subject to review.
5. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
6. I have considered relevant communications and submissions received from the parties.
7. 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.
8. 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.

Initial enquiries by OVIC

9. During the review, OVIC staff advised the Agency of my preliminary view that section 30(1) does not apply to the documents because they do not disclose consultation or deliberation between Agency officers, and consultation or deliberation between an officer and an external third party (that is not engaged by the agency) is not exempt under section 30(1). Many of the documents are from third parties, namely, [names of third parties], and therefore, the documents are not in the nature of opinion, advice or recommendation from an Agency officer.
10. The Agency was also advised that I was considering whether section 34(4)(a)(ii) applied, however, further information would be required to be satisfied the exemption applied, and that I was also considering if section 31(1)(b) was relevant in the circumstances.
11. The Agency provided further information that informed my view on sections 34(4)(a)(ii) and 31(1)(b). Based on the information before me, I will only consider section 34(4)(a)(ii).

Review of exemption

12. 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.
13. The exemption in section 34(4)(a)(ii) is intended to apply where a public sector body conducts itself or part of its operations, in a manner similar to a commercial entity.

Is the Agency engaged in trade or commerce?

14. The words trade or commerce are expressions of fact and terms of common knowledge.¹
15. Whether an agency is engaged in trade or commerce depends on the specific facts and circumstances. It requires clear evidence that the agency is doing more than delivering government services or functions.
16. Trade or commerce activities must 'of their nature, bear a trading or commercial character'.²
17. The business, commercial or financial information must be connected to the trade or commerce activity that the agency is engaged in (not government services or functions).
18. The Agency administers, promotes and manages the GMHBA stadium and hosts various sporting matches throughout the year.
19. I accept that it competes with other commercial entities/venues throughout Australia to host sporting events.
20. The documents subject to review concern correspondence between the Agency and other commercial entities following the cancellation of a Big Bash League match at the GMHBA stadium.
21. I accept the Agency is engaged in trade and commerce with respect to its activities relating to hosting sporting events at the GMHBA stadium.

¹ *Re Ku-Ring-Gai Co-operative Building Society (No 12) Ltd* [1978] FCA 50, per Deane J, Brennan J agreeing, [44].

² *Gibson v Latrobe City Council* [2008] VCAT 1340; *Concrete Constructions (NSW) Pty Ltd v Nelson* [1990] HCA 17; (1990) 169 CLR 594, 604.

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

22. The information must have a business, commercial, or financial nature. ‘Business’, ‘commercial’ and ‘financial’ should each be given their ordinary meaning.³
23. I am satisfied the documents contain information of a business, commercial and financial nature.

Would disclosure of the documents be likely to expose the Agency unreasonably to disadvantage?

24. When determining if disclosure is likely to expose the Agency unreasonably to disadvantage, three distinct elements must be identified and considered:
- (a) what the disadvantage is;
 - (b) why and when disadvantage is likely to occur; and
 - (c) the disadvantage is unreasonable.
25. An agency must be able to explain how disclosing the information would unreasonably expose the agency to disadvantage. Tribunals and courts describe ‘disadvantage’ in terms of the business, commercial or financial implications of disclosure. In particular, whether disclosure is likely to:
- reduce an agency’s capacity to compete in a competitive market for buying and selling goods or services;⁴
 - reduce an agency’s capacity to negotiate future commercial contracts;⁵
 - strengthen the bargaining position of entities the agency negotiates with, at the expense of the agency competing for marketplace share;⁶ or
 - expose the rates that an agency is prepared to accept for various services – and if so, the likely impact on the agency’s operations.
26. In this instance, I am satisfied that disclosing the documents will be likely to expose the Agency to disadvantage in the following ways:
- (a) it will reasonably likely impact its existing commercial relationships;
 - (b) it will reasonably likely impact the Agency’s capacity to favourably negotiate future commercial contracts; and
 - (c) it will reasonably likely impact the Agency’s resolution of outstanding matters relating to the cancellation of the match in a fair manner.

³ *Gibson v Latrobe CC* [2008] VCAT 1340, [25].

⁴ *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345, 348.

⁵ *Binnie v Department of Industry, Technology & Resources* (1986) 1 VAR 345, 348; *Davis v Department of Transport* [2022] VCAT 721, [58].

⁶ *Save Albert Park Inc v Australian Grand Prix Corporation* [2008] VCAT 168, [77].

27. The above disadvantages would result in the Agency missing opportunities to host future sporting events, given the Agency competes with other entities to host sporting matches.
28. The test is one of likelihood rather than certainty. It means 'probable, such as well might happen or be true'.⁷
29. I am satisfied the disadvantage resulting from disclosure of the documents would be probable.
30. Whether disadvantage would be unreasonable involves the consideration of all circumstances, including factors both in favour of, and against disclosure, such as:⁸
- The circumstances in which the information was obtained or created

The documents were created following the cancellation of the match, which affected several parties including the Agency.
 - The nature of the information

The documents are sensitive commercial communications relating to the cancellation of the match.
 - Whether the information has any current relevance

The cancellation of the match occurred over a year ago. Nevertheless, the documents still have relevance to the Agency given its ongoing commercial relationships and future tendering. Disclosure of the documents would reasonably likely impact its current commercial relationships and future tendering given the sensitive content within the documents.
 - Whether there is any public interest in disclosure or nondisclosure

While the public may be curious about the circumstances that led to the cancellation of the game and the discussion between affected parties following the cancellation, I am not satisfied there is a public interest in disclosure of the documents. Disclosing the documents will not contribute to informed public debate about an issue impacting the general population.
 - The identity of the applicant and the likely motives of the applicant

I consider it is reasonably likely that the Applicant intends to publish information within the documents, should they be released.
31. Therefore, I am satisfied that disclosing the documents would be likely to expose the Agency unreasonably to disadvantage.

⁷ *Asher v Department of innovation, Industry and Regional Development* [2005] VCAT 2702, [38].

⁸ *Asher v Department of Innovation, Industry & Regional Development* [2005] VCAT 2702, [42]-[43]; *Fitzherbert v Department of Health and Human Services* [2019] VCAT 201, [61].

32. As all three conditions of the exemption has been met, I am satisfied the documents are exempt from release under section 34(4)(a)(ii).

Section 25 – Deletion of exempt or irrelevant information

33. 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.
34. Determining what is ‘practicable’ requires consideration of the effort and editing involved in making the deletions ‘from a resources point of view’⁹ and the effectiveness of the deletions. Where deletions would render a document meaningless, they are not ‘practicable’ and release of the document is not required under section 25.¹⁰
35. The Applicant advised they do not seek access to personal affairs information of third parties. Accordingly, information that identifies third parties is irrelevant information for the purpose of my review. The Agency has redacted such information from the documents, where documents have been released to the Applicant in part.
36. I am satisfied it is not practicable to release edited copies of the documents that the Agency exempted in full to delete exempt and irrelevant information. The Agency has already released some documents to the Applicant in part, with personal affairs information deleted in accordance with section 25.

Conclusion

37. On the information before me, I am satisfied certain information in the documents is exempt from release under section 34(4)(a)(ii).
38. My decision is that no further information in the documents is to be released to the Applicant.

Timeframe to seek a review of my decision

39. If the Applicant is not satisfied with my decision, they are entitled to apply to VCAT for it to be reviewed.¹¹
40. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.¹²
41. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.

⁹ *Mickelburgh 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].

¹⁰ *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].

¹¹ Section 50(1)(b).

¹² Section 52(5).

42. The Agency is required to notify the Information Commissioner in writing as soon as practicable if the Applicant applies to VCAT for a review of my decision.¹³

¹³ Section 50(3FA).