

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: F2020155
Decision Ref: D0032021**

Participants:

Martin Toohey
Complainant

- and -

**School Curriculum and Standards
Authority**
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents containing the names of examiners – clause 11(1)(a) - whether marking of examinations is a procedure for the conduct of tests, examinations or audits – whether disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency – clause 11(2) - whether disclosure would, on balance, be in the public interest.

Freedom of Information Act 1992 (WA): Schedule 1, clause 11(1)(a) and 11(2)

Apache Northwest Pty Ltd v Department of Mines and Petroleum [2012] WASCA 167

Attorney-General's Department v Cockcroft (1986) 64 ALR 97

DPP v Smith (1991) 1 VR 63

Re H and Department of Education [2014] WAICmr 21

Re H and Graylands Hospital [1996] WAICmr 50

Re Q and Graylands Selby-Lemnos and Special Care Health Service [2003] WAICmr 33

Re Simonsen and Edith Cowan University [1994] WAICmr 10

H v Department of Education [2015] WASC 276

DECISION

The agency's decision is confirmed. I find that the disputed documents are exempt under clause 11(1)(a) of Schedule 1 to the *Freedom of Information Act 1992 (WA)*.

Catherine Fletcher
INFORMATION COMMISSIONER

30 April 2021

REASONS FOR DECISION

1. This matter arises from a decision made by the School Curriculum and Standards Authority (**the agency**) to refuse Martin Toohey (**the complainant**) access to documents under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**).

BACKGROUND

2. On 5 February 2020, the complainant applied to the agency under the FOI Act, for access to documents relating to the marking of Australian Tertiary Admission Rank (**ATAR**) course examinations for 2019. Specifically, the complainant sought access to:
 - the Marker Handbook for ATAR course examinations in 2019;
 - a list showing the names of the individuals who marked (**the markers**) a particular unit of the West Australian Certificate of Education (**WACE**) (**the examination**);
 - the timeline for the marking of the examination; and
 - a document showing the identity of the chief marker for the examination.
3. By notice of decision dated 11 March 2020, the agency provided the complainant with information about the timeline as described in point three of the access application, and refused him access to documents in relation to points one, two and four, claiming that they are exempt under clauses 5(1)(e) and 11(1)(a) of Schedule 1 to the FOI Act.
4. On 16 March 2020, the complainant sought internal review of the agency's decision. By letter dated 16 April 2020, the agency varied its decision and gave the complainant access to the Marker Handbook described in point 1 of his access application. The agency confirmed its decision to refuse the complainant access to the documents identified in points 2 and 4.
5. On 20 April 2020, the complainant applied to my office for external review of the agency's decision to refuse him access to documents identified in points two and four above (**the disputed documents**).

REVIEW BY THE INFORMATION COMMISSIONER

6. The agency provided my office with copies of the disputed documents together with its FOI file maintained in respect of the access application.
7. As a result of inquiries by my office, the agency provided additional information about its marking processes.
8. Additionally, the agency withdrew its claims that the disputed documents are exempt under clause 5(1)(e), but maintained its claims that the disputed documents are exempt under clause 11(1)(a) of Schedule 1 to the FOI Act (**clause 11(1)(a)**).
9. On 10 February 2021, after considering the material then before me, I provided the parties with my preliminary view of the matter (**preliminary view letter**). It was my preliminary view, on the information then before me, that the disputed documents are exempt under clause 11(1)(a).

10. I invited the complainant to accept my preliminary view or to provide me with further submissions, by 3 March 2021.
11. By letter dated 11 February 2021, the complainant advised that he did not accept my preliminary view and made further submissions.

The onus of proof

12. Under section 102(1) of the FOI Act, the onus is on the agency to establish that its decision is justified or that a decision adverse to another party should be made. Accordingly, in this instance, the agency bears the onus of establishing that its decision to refuse the complainant access to the disputed documents was justified.

CLAUSE 11 – EFFECTIVE OPERATION OF AGENCIES

Clause 11 so far as is relevant, provides that:

- (1) *Matter is exempt matter if its disclosure could reasonably be expected to –*
 - (a) *impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency; or*
 - ...
- (2) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*

The agency's submissions

13. The agency's submissions are set out in its notice of decision, dated 11 March 2020 and in the additional submissions provided to this office on 19 October 2020. In summary, the agency submits as follows:
 - *The [School Curriculum and Standards Authority (SCSA)] is the Agency in Western Australia responsible for the development, conduct, marking and results of the high stakes examination process for the State which determines the results and potential pathway into university for students in Year 12 in Western Australian schools.*
 - *If there is any impediment to the successful conduct and effectiveness of the examination process run by the SCSA, this puts at risk the successful completion of the requirements to achieve the Western Australian Certificate of Education (WACE) and potential university offers for over 14 000 Year 12 students each year.*
 - *In order to retain the confidence and integrity of the marking and examination system, it is important that markers can carry out their functions with anonymity. Disclosure of the names of the markers:*

- *could reasonably be expected to impair the effectiveness of the agency to conduct the state-wide examinations for which it is responsible because individual markers would feel threatened;*
- *would result in the professionalism and judgement of those individuals being called into question;*
- *may further result in individual markers being required to defend the marks they have awarded to individual students; and*
- *could result in other access applications for the same information from not only other teachers, but also parents and media organisations (which has occurred in the past).*

- *The markers are employed by the SCSA following a recruitment process through which we confirm their ability to make fair and accurate judgements against the standards of achievement related to these high stakes examinations. Confidentiality/anonymity allows the markers to perform their duties without fear of scrutiny by their peers, parents or the media.*

- *During the induction process for the markers, the matter of confidentiality of the role is discussed. Markers are instructed not to disclose their role and an undertaking is given that the agency will not disclose their identity. All markers sign a Code of Conduct to this effect.*

- *The SCSA has previously experienced an incident involving the identity of one of the markers being revealed and that person received personal threats to their safety at work and at home. In addition, we have, over the years, received requests from media outlets in relation to the identity of the markers because they had been approached by parents who were not happy with their child's examination results and were seeking to lay blame via the media.*

- *The potential impact of a decision by the Commissioner to release the names of the markers (and Chief Marker) for this particular examination would be to open the agency to further requests, from any source.*

- *It is highly likely that should any marker whose identity is released be harassed or intimidated in any way, either in their school, across the education sector, or in the media, would result in a dramatic reduction in the numbers of qualified, experienced teachers applying to fill these positions in future years.*

- *Given the high stakes nature of the SCSA examination process and timeline, if the required number of experienced markers cannot be employed in any future year, for any of the 52 State-based examinations, the entire examination process could be at risk. This would mean that thousands of students may not achieve their WACE and the results required for university entrance offers would not be available.*

- *In addition, if the numbers and quality/experience of the markers is not maintained, this also puts at risk our ability to maintain the rigorous high standards of secondary education in Western Australia.*

- *The SCSA considers that it is vital that the SCSA Code of Conduct and anonymity given to the markers is maintained.*

Specifically in relation to the moderation of ATAR marks, the agency has provided the following extracts from the WACE Manual 2020; this information is available on the agency's website:

6.4.4 Marking of written and practical examinations

Marking keys are an explicit statement about what the examination panel expects of candidates when they respond to particular examination items. They are provided by the examination panel as provisional documents, to be refined or modified as necessary in the light of sample marking and discussion between the Chief Examiner and the Chief Marker.

Double-marking of each examination answer/response (written, oral, performance, production or portfolio) is carried out independently. If differences between the marks of the first and second markers, either for an item, section or the whole paper, are outside an acceptable range (as determined by the Chief Examiner), then a reconciliation of marks is undertaken.

Statistical analysis is used to monitor the standards and consistency of marking and to provide Chief Examiners with feedback.

Before the finalisation of examination marks, Chief Markers are provided with reports for them to confirm the integrity of the marks. Reports include:

- *item analysis (giving statistics on the functioning of each item in the examination)*
- *marking statistics (showing atypical marking).*

...

6.4.8 After the examinations

Results checks

*Examination results can be checked, if a candidate doubts the accuracy of any result. A check is made to confirm that each question attempted has been awarded a mark and that it has been recorded correctly. **Neither the written script nor the practical (oral, performance or portfolio) will be re-marked.***

A fee is payable for each course checked. If an error is detected, the fee will be refunded and the higher of the two marks awarded. This application form will be available at <http://www.scsa.wa.edu.au/forms/forms>. The deadline for submitting applications will be published on the Authority website in 2020. If any errors are detected, the Authority will notify TISC.

Statement of raw ATAR course examination marks

The Authority will, on application, issue a candidate with a statement of raw ATAR course examination marks. The statement will provide the marks awarded for each question or section (some questions may need to be combined) of a course. A fee per course is payable at the time of making the application.

This application form will be available at <http://www.scsa.wa.edu.au/forms/forms>. The deadline for submitting applications will be published on the Authority website in 2020.

Accessing examination scripts

Candidates who sit the 2020 ATAR course examinations may apply for a copy of their written examination scripts. A fee per course is payable at the time of making the application. Applications for copies of scripts must be made on the appropriate application form before the date advertised. This application form will be available at <http://www.scsa.wa.edu.au/forms/forms>.

Copies of examination scripts will be provided in mid-February when all of the processes connected with ATAR course examinations are completed.

The complainant's submissions

14. The complainant's submissions are set out in his request for internal review, dated 16 March 2020, his letter to me seeking external review, dated 20 April 2020 and his response to my preliminary view letter, dated 11 February 2021. In summary, the complainant submits as follows:
- The requested information was in relation to a past exam not a future exam, therefore it was not clear how disclosure would impair the examination process other than that 'it may'.
 - Just because someone was threatened on one occasion does not create a broader issue to the safety of markers generally. The agency would have employed many hundreds of markers over the years across a large number of subjects. The identity of markers is often well known by teachers and openly discussed by individuals. It is quite possible that the information regarding the identity of the marker who was threatened came from any number of sources.
 - The notion that threats 'may also create a risk for the effective operation of an examination process, whether in the past or in the future', is not explained by repeating the claim that threats could occur.
 - Teams of markers meet with each other and therefore know other markers' identities; claims of undue pressure are speculative and would no doubt be dealt with by the police as would threats to any other public service worker (or anyone else).
 - The markers are public servants and should be accountable for their actions.

- The agency has provided no evidence to show that if examiners are threatened this will result in a decline in the number of markers willing to undertake the role.
- As markers do not know whose papers they are marking the agency's claims that they may be threatened are unfounded.
- There is no real recourse for students if their exams are marked incorrectly.
- Costs to obtain scripts are prohibitively high.
- The public interest in the accountability of the agency is not satisfied by the measures the agency has in place.

Consideration

15. To establish the exemption under clause 11(1)(a) the agency must show that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of its methods or procedures for conducting tests or examinations.
16. In *Attorney-General's Department v Cockcroft* (1986) 64 ALR 97 at page 106, the Full Federal Court said that the words 'could reasonably be expected' were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were disclosed. This approach was accepted as the correct approach in *Apache Northwest Pty Ltd v Department of Mines and Petroleum* [2012] WASCA 167.

Clause 11(1)(a) – Meaning of 'test' and 'examination'

17. It is necessary to consider the meaning of the terms 'test' and 'examination' for the purpose of the exemptions in clause 11(1)(a). The Information Commissioner considered the meaning of those terms in a number of decisions, including *Re Simonsen and Edith Cowan University* [1994] WAICmr 10 (*Re Simonsen*), *Re Q and Graylands Selby-Lemnos and Special Care Health Service* [2003] WAICmr 33 and *Re H and Graylands Hospital* [1996] WAICmr 50, and more recently in *Re H and Department of Education* [2014] WAICmr 21, which was upheld by the Supreme Court in *H v Department of Education* [2015] WASC 276.
18. The term 'test' is relevantly defined in the Australian Oxford Dictionary (2nd Edition, 2004), to mean, among other things, 'a critical examination or trial of a person's or thing's qualities ... the means of so examining ... a standard for comparison or trial ... a minor examination'.
19. In *Re Simonsen*, the relevant 'test' concerned the testing of the vocational competence of students through examination papers.
20. I consider that the examination, administered by the agency, is a formal process of evaluation of students' knowledge of that unit. Having examined the disputed documents and considered the submissions of the parties, I am satisfied that the

examination falls within the meaning of ‘tests’ or ‘examinations’ as those terms are used in clause 11(1)(a).

Clause 11(1)(a) – impair the effectiveness of an agency’s methods or procedures for the conduct of ‘tests’ or ‘examinations’

21. The next issue for me to determine is whether disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the agency’s methods or procedures for conducting the examination.
22. The stated objects of the FOI Act in section 3(1) are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and local government more accountable to the public.
23. The role of the agency is to develop and conduct a marking system for the ATAR examinations for the State of Western Australia. As part of that process, the agency engages a number of markers for the specific purpose of marking examinations. The agency has detailed the process for engaging such individuals, together with the induction undertaken by those individuals. I note, from the agency’s website that applications for the roles for 2020 were invited as follows:

The School Curriculum and Standards Authority (the Authority) invites applications from current and retired teachers and TAFE and University lecturers to participate in the development of the 2020 ATAR course examinations.

24. I consider that the role undertaken by the markers engaged by the agency is of considerable importance. The actions of those individuals can have a significant effect on the students who participate in the exams. From the information provided by the agency, I consider that the agency takes steps to engage individuals with the particular skills and experience to carry out the required role.
25. The agency submits that there has been a previous instance of a marker receiving threats, due to the disclosure of that individual’s name, and that if other markers or potential markers considered it likely that their names would be disclosed, this would adversely impact on the number of markers willing to undertake the role. This, in turn, would mean that the effectiveness of the agency’s examination processes would be impaired.
26. In view of the significant effect a mark may have on the future of a student, I consider it is reasonable to expect that if the names of those markers are made public, some aggrieved students and/or parents may seek to challenge the marks that have been awarded, with the markers themselves, rather than using the appropriate mechanisms established by the agency.
27. The complainant submits that he requires the names of the markers of a particular past exam rather than any future exam; however, it is reasonable to expect that there is a pool of experienced individuals from which people are engaged to undertake the role, and that some individuals will be engaged from year to year. Accordingly, it is

reasonable to expect that the disclosure of the names of the markers will reduce the size of the pool of markers available in general, for future exams.

28. The complainant submits that the agency has provided no evidence to show that disclosure of the disputed information will result in a decline of people willing to undertake the marking of the examination.
29. It is reasonable to expect that markers could be identified and contacted by way of the internet and other social media. The complainant claims that as the markers do not know whose papers they are marking the agency's claims are unfounded. However, given the relatively small number of markers for the examination, I consider that this would not dissuade an aggrieved student, parent or interested media organisation, from making enquiries of the group of markers, to identify the relevant individuals.
30. In my view, it is reasonable to expect that if the names of markers are disclosed, there is a real risk that individuals will be less likely to apply to be markers and the pool of qualified, experienced markers will diminish. I accept that this will undermine the recruitment of the many markers needed for the ATAR system to work effectively, and therefore impair the agency's procedures for the conduct of examinations.
31. I am satisfied, on the material before me, that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the procedure for the conduct of examinations by the agency.
32. As I consider that clause 11(1)(a) has been satisfied I am required by clause 11(2) to consider whether disclosure of the disputed documents would, on balance, be in the public interest.

Clause 11(2) – Public Interest

33. Determining whether or not disclosure would, on balance, be in the public interest involves identifying the relevant competing public interests – those favouring disclosure and those favouring non-disclosure – weighing them against each other and making a judgement as to where the balance lies in the circumstances of the particular case.
34. Under section 102(3) of the FOI Act, the onus is on the complainant to establish that disclosure would, on balance, be in the public interest.
35. The term 'public interest' is not defined in the FOI Act. In my view, the term is best described in the decision by the Supreme Court of Victoria in *DPP v Smith* (1991) 1 VR 63 at page 75, where the Court said:

The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals...

36. In weighing against disclosure, I recognise that there is a public interest in the maintenance of the integrity and effectiveness of the agency's methods and procedures for the conduct of the examination.
37. Additionally, weighing against disclosure, I recognise there is a public interest in the maintenance of personal privacy and that the protection of an individual's privacy is a public interest that is recognised in the FOI Act by clause 3(1).
38. In favour of disclosure, I recognise the public interest in the accountability of agencies for the manner in which they discharge their functions and consider their actions and decisions should be as transparent as possible. I therefore accept there is a public interest in the accountability of the agency in the way it develops and carries out the process of setting and marking examinations.
39. I recognise a public interest in the disclosure, where possible, of documents that inform the public of the basis for decision-making and of the material considered relevant to the decision-making process because such disclosure enhances accountability.
40. However, the agency publishes its processes on its website, including the current WACE manual. For the examination process itself, there are a number of checks that the agency undertakes in order to promote consistency. Additionally, there is a mechanism by which aggrieved individuals can raise concerns about the process.
41. Specifically, there are checks and balances in place to identify and correct situations where there are significant differences between particular marks. For example, I note from the 2020 WACE manual that double-marking of each examination answer/response (written, oral, performance, production or portfolio) is carried out independently. If differences between the marks of the first and second markers, either for an item, section or the whole paper, are outside an acceptable range (as determined by the chief examiner), then a reconciliation of marks is undertaken.
42. In the 2020 WACE manual there is also provision for a student, who has concerns about the accuracy of an examination result, to purchase his or her script and/or have the results checked. In the complainant's response to my preliminary view letter, he claimed that the cost of a script is prohibitive. The agency has confirmed to my office that the fee payable for a script or for a results check is \$48. In my view, if a student had genuine concerns about the accuracy of the test result, such a fee would not be onerous.
43. In this particular matter, the agency has also provided the complainant with the marking handbook and the marking timeline for the examination.
44. I note that the ratified marking key for past ATAR examinations is also available on the agency's website.
45. While I accept there is a public interest in the accountability of the markers, on behalf of the agency, I am not persuaded that disclosure of the names of the markers would enhance the accountability of the agency in carrying out its marking processes.

46. In weighing the competing public interests, I find, on balance, on the information currently before me, that the public interest factors weighing against disclosure of the disputed documents outweigh those favouring disclosure. As a result, the limit in clause 11(2) does not apply.

CONCLUSION

47. I find that the disputed documents are exempt under clause 11(1)(a) of Schedule 1 to the *Freedom of Information Act 1992* (WA). Accordingly, the agency's decision is confirmed.
