

Decision D0042023 – Published in note form only

Re ‘T’ and Department of Education [2023] WAICmr 4

Date of Decision: 11 May 2023

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

On 31 August 2021, ‘T’ (**the complainant**) applied to the Department of Education (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents in relation to various assessments, tests and examinations taken by her son, for an ATAR subject (**the disputed documents**). To protect the identity of the complainant’s son, the Information Commissioner (**the Commissioner**) decided not to identify the complainant in this matter.

On 7 October 2021, the agency provided the complainant with a notice of decision advising that there were 16 documents within the scope of the access application, and that access to those documents was refused on the basis that they are exempt under clause 11(1)(a) of Schedule 1 to the FOI Act (**clause 11(1)(a)**).

As the agency’s decision was made by its principal officer, there was no right to internal review pursuant to section 39(3) of the FOI Act. On 11 October 2021, the complainant applied to the Commissioner for external review of the agency’s decision.

The agency provided the Commissioner with a copy of the disputed documents and the FOI file it maintained in respect of the access application. The Commissioner’s office made further inquiries with the agency to assist with her deliberations in this matter.

On 30 December 2021, after considering the material then before her, the Acting Information Commissioner (**the A/Commissioner**) provided the parties with her preliminary view of the matter. It was the A/Commissioner’s preliminary view that the disputed documents were exempt under clause 11(1)(a).

The complainant did not accept the A/Commissioner’s preliminary view and made further submissions regarding the public interest limit in clause 11(2). After considering all of the material before her, the Commissioner was not dissuaded from the preliminary view.

Clause 11(1)(a) provides that matter is exempt matter if its 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.

The Commissioner was satisfied that the disputed documents were assessments that formed part of a formal process of evaluation of students’ knowledge of the relevant unit of study and therefore that the assessments came within the meaning of ‘tests’ or ‘examinations’ as those terms are used in clause 11(1)(a): *Re ‘H’ and Department of Education [2014] WAICmr 21* and *Re Toohey and School Curriculum and Standards Authority [2021] WAICmr 3*.

The Commissioner was of the view that disclosure of the disputed documents could reasonably be expected to impair the effectiveness of the agency’s methods or procedures for the conduct of the tests or examinations. In reaching that view, the Commissioner accepted

that schools develop and reuse valid, reliable and discriminatory assessment tasks and that a significant amount of time is involved in creating assessment papers. The Commissioner observed that whilst some examination papers are published, the assessments that constituted the disputed documents are not. The Commissioner also accepted that releasing assessment tasks to students would adversely compromise test security in the administration of tests and examinations and impact on the effectiveness of testing and moderation procedures.

The Commissioner was satisfied that the disputed documents are, on their face, exempt under clause 11(1)(a).

Clause 11(1)(a) is subject to the limit in clause 11(2) which provides that matter is not exempt under clause 11(1), if its disclosure would, on balance, be in the public interest. Under section 102(3) of the FOI Act, the onus was on the complainant, as the access applicant, to establish that it would, on balance, be in the public interest for the agency to disclose the disputed documents to her.

In favour of disclosure, the Commissioner recognised the public interest in the openness and accountability of State and local government agencies. The Commissioner observed that the agency plays a significant role in maintaining a fair and consistent process in the moderation of student marks to assess the educational standards of students and should be accountable for the performance of that role. The Commissioner accepted that, to maintain integrity in the performance of that role, the agency (and its schools) use similar tests and exam questions so that a comparison of results of similar cohorts of students may be attained.

The Commissioner considered that the disclosure of the specific details of individual tests or examinations would likely diminish the agency's ability to maintain the integrity of its methodology. Weighing against disclosure, the Commissioner recognised 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 its assessments.

The Commissioner observed that under section 10(2) of the FOI Act, the reasons a person gives for wishing to obtain access to documents does not affect their right to be given access to documents. The Commissioner accepted the complainant's submission that an applicant's reasons for seeking access to documents, and the reasons that the complainant expressed in the course of the external review, may be relevant to the consideration of where the public interest balance should lie: *Re Kobelke and Department of Productivity and Labour Relations* [1998] WAICmr 17 at [31]. Based on the material provided by the complainant, the Commissioner considered that the complainant sought access to the disputed documents primarily to further a private grievance and that her personal interests did not weigh in favour of disclosure of the disputed documents.

After weighing the competing public interests, the Commissioner was not persuaded that the public interests in favour of disclosure of the disputed documents outweighed the public interest factors against disclosure. As a result, the Commissioner considered that the limit on the exemption in clause 11(2) did not apply to the disputed documents.

Accordingly, the Commissioner confirmed the agency's decision and found that the disputed documents are exempt under clause 11(1)(a) of Schedule 1 to the FOI Act.