OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: F2013051 Decision Ref: D0212014

Participants:

'H'
Complainant

- and -

Department of Education
Agency

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – questions in chemistry test paper for Senior School chemistry unit – Clause 11(1)(a) – whether disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of tests or examinations – public interest factors – public interest in integrity of test results and in finality of outcome – public interest in effective use of public resources.

Freedom of Information Act 1992: sections 102(1) and 102(3), Schedule 1, clauses 11(1)(a), 11(1)(b) and 11(2)
Freedom of Information Act 1982 Act (Cth)
Right to Information Act 2009 (Qld)

Apache Northwest Pty Ltd and Department of Mines and Petroleum [2012] WASCA 167
Attorney-General's Department v Cockcroft (1986) 64 ALR 97
Re H and Graylands Hospital [1996] WAICmr 50
Re Q and Graylands Selby-Lemnos and Special Care Health Service [2003] WAICmr 33
Re Redfern v University of Canberra [1995] AATA 200
Re Simonsen and Edith Cowan University [1994] WAICmr 10
Tsai and Griffith University [2014] QICmr 39

DECISION

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

Sven Bluemmel
INFORMATION COMMISSIONER

14 November 2014

REASONS FOR DECISION

1. This complaint arises from a decision made by the Department of Education (**the agency**) to refuse 'H' (**the complainant**) access to a chemistry test paper under the *Freedom of Information Act 1992* (**the FOI Act**).

BACKGROUND

2. On 9 November 2012 the complainant applied to the agency for access to a chemistry test paper, completed by his child at a Senior School (**the School**) in August 2012.

3. On 21 December 2012 the agency identified 6 pages falling within the scope of the application. The agency decided to give edited access to those pages on the basis that the questions in the test paper were exempt under clause 11(1)(a) and 11(1)(b) of Schedule 1 to the FOI Act (**the agency's decision**).

4. On 21 December 2012 the complainant applied for internal review of the agency's decision. On 24 December 2012 the agency confirmed its decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 25 February 2013 the complainant applied to me for external review of the agency's decision.

6. On receipt of this complaint, I required the agency to produce to me its FOI file maintained for the purposes of the complainant's access application and the document to which access was refused.

7. I examined the FOI file and the disputed information and considered the information before me, including the agency's decision and submissions and the submissions contained in the complainant's application for external review and subsequent correspondence. My officers also made further inquiries with the agency.

8. I formed the preliminary view that the disputed information may not be exempt. On 17 April 2014 my preliminary view was given to the parties. The agency was invited to provide further evidence that disclosure could reasonably be expected to impair the effectiveness of any method or procedure for the conduct of chemistry tests. In particular, the agency was asked to explain why, as submitted by the agency, it would be difficult and time-consuming to re-write each chemistry test.

9. My preliminary view was also that neither party had addressed the public interest consideration under clause 11(2) in sufficient detail.

10. The agency and the complainant provided further extensive submissions and were given the opportunity to further comment on each other's submissions. After considering those submissions, I provided the parties with my supplementary preliminary view.

11. On 11 July 2014 I advised the parties that, based on the information before me, my view was that the disputed information was exempt under clause 11(1)(a). It was also

my view that the complainant had not established that disclosure of the disputed information would, on balance, be in the public interest under clause 11(2).

12. The parties were invited to provide further submissions. I have considered the further submissions provided by the parties.

THE DISPUTED INFORMATION

13. The matter in dispute is the questions in the chemistry test paper from August 2012 (**the disputed information**).

The onus of proof

14. The agency bears the onus under section 102(1) of the FOI Act to establish that its decision is justified. In reaching its decision to refuse access to the disputed information, the agency is required to consider the limit on exemption in clause 11(2) of Schedule 1 to the FOI Act. That is, having decided that the disputed information is exempt under clauses 11(1)(a) of Schedule 1 to the FOI Act, the agency should then consider the public interest factors for and against disclosure of the disputed document.

15. 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.

CLAUSE 11 – EFFECTIVE OPERATION OF AGENCIES

16. 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*
>
> *(b) prevent the objects of any test examination or audit conducted by the agency from being attained.*
>
> …
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest.*

The complainant's submissions

17. In summary, the complainant submits as follows:

- Tests should be disclosed to improve the development of a productive feedback mechanism from parents and to improve the quality of the tests at the School. Initially, the science department may experience difficulty in re-writing each test but the quality of the questions will improve through continual feedback and 'the situation will get better over time.'

- Allowing students brief access to their test and exam papers in class does not provide an adequate review and discussion opportunity for them to learn from mistakes. Due to the power relationship between students and teachers, and the students' insufficient knowledge, they cannot discuss the test questions and answers critically. As a result, the science department effectively controls the discussion of the test content and thus prevents feedback from students and parents.

- Some test questions require students to understand course content that has not been covered in class. Because parents do not know exactly what content was covered in class and what has been asked in tests, they cannot make an inquiry to science teachers, particularly when there was a discrepancy between science lessons and tests.

- Poorly performing students cannot learn sufficiently from a short review session and they cannot learn from their mistakes. Therefore, the current policy of withholding tests and exams discriminates against low academic achievers.

- If the science department released test papers regularly, science teachers might coordinate their lessons and test questions better. The quality of education cannot be maintained by withholding test papers. Due to the small number of test questions, the current science tests cannot satisfy 'the Principles of Assessment from the Curriculum Framework.'

- If tests are not disclosed, they will be biased and unfair because some tutors and siblings of other students have access to test questions which are recycled by the School. Given the amount of science test questions available in the public domain, it is not difficult for the School to re-write tests. The School exaggerates the cost of parental involvement whilst hiding the benefits of parental input in increasing the quality of science tests and exam questions.

- The School accepts that test writing is part of a teacher's job and it is included in the budget. Thus, test-writing is simply a normal operational cost. Some of the exams are evaluated by outsiders but, given the volume of the tests for various subjects and year levels, it is not possible for outside reviewers to evaluate all tests and exams.

- The School overestimates the time required to write new test questions. Teachers do not teach new content to students in Years 8, 9, and 10 during the last few weeks of Term 4. Year 11 is dismissed two weeks earlier in early December and there is no class for Year 12 from November. Science teachers can use tuition free weeks to prepare a new set of tests each year.

- The complainant has received all the test and exam papers between Years 8 and 10 from all departments at the School, except the science department.

The agency's submissions

18. In summary, the agency submits as follows:

- If previous test papers were disclosed, this would give an advantage to students who access those papers. Therefore, to preserve the integrity of the test results, the School would be required to devise new test questions for each test.

- It would be costly and time consuming to re-write each science test. A Head of Department earns about $75 per hour and a Level 2 teacher earns between $50-60 per hour (depending on their level of experience). There are 5 papers per year in Year 9. The tests take 2 hours to write. The tests are checked by the other teachers who deliver the test. Suggested changes and corrections are made before a further check of the test. This equates to about 6 hours' work per test. Therefore, the cost of preparation is $390 per test. In Years 8-10, this equates to a conservative estimate of $3900.

- 5 Science subjects are taught in Years 11 and 12. The rigour of these tests is greater. As a result, more time is taken to write tests for those years. On a conservative estimate, there are 7 tests per subject and an exam each semester in Year 11, with a similar load in Year 12. The cost of preparation is approximately $31,200. This calculation doesn't include the time taken to write, check, correct and refine other assessment items.

- Disclosure of the tests will reduce the number of questions available and result in greater time to develop quality questions that address the "Principles of Assessment from the Curriculum Framework", which are questions that are valid, fair, comprehensive, educative and explicit. This will result in many more hours devoted to developing a bank of effective questions, at the expense of other teaching duties.

- The agency's contentions as to the burden imposed by disclosure are supported by an article titled 'Reinventing the Wheel – Assessment in Science' published in the Australian Science Teachers' Journal. The author of the article is a Head of Department with 25 years' experience in science teaching. In summary, the article supports the agency's argument that it takes many hours to develop tests that meet the benchmark required by the Curriculum Council. That benchmark requires that the tests be valid, fair, comprehensive, educative and explicit. Any new test questions should also be an adequate predictor of student performance at end of year and external examinations. As a result, the article maintains that releasing all tests is not common practice in all science departments.

- Contrary to the complainant's assertion, the School's Maths Department does not release all assessment items. It releases some questions as it has a wider range of questions and contexts from which questions can be developed. The department does not release assignment items as they take a long time to develop and refine.

- Although internal tests are not externally moderated, the School and its departments are subject to National and State standards in accordance with the Teaching Framework, authorised by the Curriculum Council. Schools are regularly inspected and a review of a department can take place at any time. In addition, as an Independent Public School (**IPS**), the School is audited every three years.

- All Senior School subjects undergo consensus moderation every two years (and every year in the first two years a course runs). A school is required to present all the assessment items as well as samples of student work from different grade boundaries. This work is anonymously assessed by two other subject specialists and a report is written to justify the marks given by these other assessors. That is an external moderation of internal assessments, including science tests.

- Although tests are re-written regularly they are unlikely to be 'changed wholesale' because this impacts on the comparability of one cohort against another. The data generated from comparing cohorts is used to assess how best to support particular cohorts and individual students and gauge what refinements need to be made to programs. Therefore, it is important that the integrity of question banks is maintained to ensure the rigour and range of questions that can be used remains comparable.

Consideration

19. To establish the exemption under clause 11(1)(a) the agency must show that disclosure of the disputed information could reasonably be expected to damage the effectiveness of its methods or procedures for conducting tests or examinations.

20. 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 and Department of Mines and Petroleum* [2012] WASCA 167.

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

21. 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 former 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 (***Re Q***) and *Re H and Graylands Hospital* [1996] WAICmr 50 (***Re H***).

22. In *Re Simonsen*, the relevant 'test' concerned the testing of the vocational competence of students through examination papers. In *Re H* and *Re Q*, the relevant 'tests' concerned psychological testing documents. 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'.

23. In *Re Simonsen*, the 'examination' under consideration concerned examination papers which were constructed from multiple choice, short answer and essay questions. In *Re H*, the examination concerned the clinical examination of patients through the conducting of psychological tests. The 'tests' conducted in those decisions related to

formal processes of evaluation where a specified result, rating, score or standard for comparison could be achieved.

24. I consider that the chemistry test administered by the School was a formal process of evaluation of students' knowledge of a chemistry unit. Having examined the disputed information and considered the submissions of the parties, I am satisfied that the chemistry test falls within the meaning of 'tests' or 'examinations' as those terms are used in clause 11(1)(a).

25. I am required to consider if disclosure of the chemistry test could reasonably be expected to damage the effectiveness of the School's methods or procedures for conducting the chemistry tests.

26. In *Re Simonsen* the applicant sought access to examination questions for units of the Bachelor of Nursing Course. The agency granted access to the answers to those questions but maintained that the questions were exempt under clauses 11(1)(a) and 11(1)(b).

27. In *Re Simonsen*, the University explained that in constructing examination papers, the examiner draws questions from item banks which are maintained by various course co-ordinators. An item bank is a series of examination questions for a particular unit that are developed as curricula change and are reviewed on a regular basis. Some questions are repeated from year to year and others may be used as the root for new questions if staff choose to modify those previously used. Whilst the University was not able to provide accurate statistics on the use and frequency of use of each examination paper in dispute, from the material available, the Commissioner was able to discern that the general practice adopted by the University's examiners is to re-use or re-work the questions from examination to examination.

28. The Commissioner concluded that it is reasonable to expect some damage to result to the method of examination in the relevant units in the School of Nursing, as claimed by the University, if the examination questions for the examination of those units are disclosed because there is a real possibility that students will be able to anticipate examination questions in the future. If this occurs, the effectiveness of this method of testing student competency will be reduced and such an effect would impair that system.

29. The Commissioner also accepted the University's claim that developing suitable questions, which accord with recognised practices of question construction, is difficult and time consuming and there is a limit to this procedure unless the knowledge base or curriculum changes substantially. The Commissioner was satisfied that it is reasonable to expect that, if the documents were released to the applicant, in future the method of examination would be less effective and new methods of testing may need to be developed by the University.

30. The Commissioner was also of the view that, although there is a public interest in the applicant being able to exercise his rights under the FOI Act, that public interest is outweighed by the public interest in ensuring that students graduating from the School of Nursing are able to properly care for patients because their skills and knowledge have been effectively tested at an appropriate standard.

31. In my first preliminary view in the current matter, I distinguished *Re Simonsen* on the basis that there was not then persuasive evidence before me that developing suitable questions was difficult or time-consuming. The agency subsequently provided further submissions on the time and cost involved in writing new tests. Although the complainant challenges the estimates given by the agency, in my view, it is clear that devising new tests is a significant impost on the School.

32. In particular, the School explains that any new test must meet the "Principles of Assessment from the Curriculum Framework." Therefore, I accept that it is not open to the School to simply adopt test questions in the public domain because those questions will not necessarily have the character required by the Curriculum Council. The School's explanation is supported by another Head of Department from another Senior School with many years of science teaching experience.

33. In my view, disclosure of chemistry tests will allow students to study selectively and to anticipate the questions that will be asked in a test. As a result, the effective use of the test as an indication of a student's knowledge and the application of that knowledge in a test environment could reasonably be expected to be damaged. Therefore, disclosure of the tests could reasonably be expected to damage their effectiveness.

34. The complainant's submissions indicate that he accepts that is the case. However, he argues that it is not difficult or time consuming for the School to devise new tests for each test conducted in Years 8 to 12.

35. In the absence of evidence to the contrary, for the reasons previously outlined, I accept that there is a significant cost to the School in re-writing tests. Therefore, I do not accept the complainant's submission that the chemistry tests could easily be re-written.

36. In *Re Redfern v University of Canberra* [1995] AATA 200 (***Re Redfern***), Deputy President McMahon considered analogous legislative provisions under the *Freedom of Information Act 1982 Act (Cth)* and decided that the question to be determined was whether 'disclosure of the requested documents could reasonably be expected to prejudice the procedures for the conduct of examinations.' In my view, a similar determination is required under clause 11(1)(a).

37. In *Re Redfern* at [38-39] it was concluded that the disclosure of candidates' responses to examination questions could reasonably be expected to prejudice the effectiveness of procedures for the conduct of examinations:

> *There are 2 principal reasons for this. Firstly, disclosure would be inimical to the degree of finality required in order for the objects of the examinations to be met. It is accepted that various academic examiners may have different views…. Nevertheless, it is essential to the exam system that their final view, if properly and fairly arrived at, should prevail. If other students' examination papers are released for the purpose of enabling students, such as the applicant, to conduct their own review of the relative academic merits of their own performance, the University's formal assessment and review processes would be subject to informal collateral disagreement. This would undermine the finality of the assessment and review process.…The second reason for prejudice relates to the possibility of plagiarism.*

38. I consider that disclosure of the disputed information could reasonably be expected to have a similar effect as observed in *Re Redfern*, that is, each test could be subject to 'informal collateral disagreement.' The complainant submits that *Re Redfern* should be distinguished because, among other matters, the complainant is not seeking other students' responses to the chemistry test. I accept that difference. However, the effect of disclosure is likely to be the same. That is, it will encourage debate by parents and others about each question in each test and the marking of each question in each test.

39. *Re Redfern* also refers to plagiarism resulting from disclosure of the disputed documents. In this case, I consider that giving some students an advantage by disclosing previous tests may be equally damaging to the integrity of test results.

40. For the reasons outlined, I am of the view that disclosure of the disputed information could be reasonably expected to impair the effectiveness of its methods or procedures for conducting tests as provided by clause 11(1)(a).

41. Because of my decision about clause 11(1)(a), it is not necessary for me to consider the agency's claim under clause 11(1)(b).

Clause 11(2) – Public interest

42. Clause 11(1)(a) is qualified by clause 11(2). Deciding whether or not disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure and those that favour non-disclosure, weighing them against each other and making a judgment as to where the balance lies. 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.

43. The term 'public interest' is not defined in the FOI Act. It is 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 ... There are ... several and different features and facets of interest which form the public interest.*

44. In short, the public interest is a matter in which the public at large has an interest as distinct from the interests of a particular individual or individuals.

45. ***Tsai and Griffith University*** [2014] QICmr 39 (**Tsai**) concerned an application to Griffith University (**GU**) under the *Right to Information Act 2009* (Qld) for copies of exam papers and marking guides for exams sat by the applicant in GU's School of Medicine. GU refused access, in part, to those documents on the basis that disclosure would, on balance, be contrary to the public interest. The Queensland Right to Information Commissioner (**the Queensland Commissioner**) affirmed GU's decision on the grounds that disclosure of the requested information could reasonably be

expected to prejudice the effectiveness of GU's examination methods. It was considered that disclosure would, on balance, be contrary to the public interest.

46. I observe that the public interest test under consideration in *Tsai* is different from the public interest test under clause 11(2). In *Tsai* the test was whether disclosure would, on balance, be contrary to the public interest. Therefore, the test was more onerous than in the present case.

47. In *Tsai*, in relation to factors favouring disclosure, it was accepted [at 11 -12] that it was reasonable to expect that disclosure of the disputed information would enhance GU's accountability for the assessment and grading of its students. Disclosure would also provide the applicant with contextual and background information used by GU in awarding him particular grades, thus arguably permitting him to better understand those grading decisions.

48. The Queensland Commissioner also considered that there is a public interest in facilitating positive educational outcomes, and that providing students with appropriate feedback on individual exam performance is one way of maximising this public good. By allowing the applicant to compare his answers against 'model' answers in the marking guides, disclosure could assist in advancing this public interest.

49. It was not accepted in *Tsai* that the public interest considerations described above were sufficient to displace the deleterious public interest consequences that could reasonably be expected to follow disclosure of the disputed information. The GU School of Medicine regularly reuses exam problems and questions in its examinations, a practice enabling it to deliver sufficiently rigorous examination in a field of undoubted social significance – medicine – economically and efficiently. Unconditional release of a particular set of questions or assessment items could, therefore, reasonably be expected to prejudice this examination method or procedure. This is because such release would preclude the possibility of relevant questions' future usage, as to do so would be to run the risk that candidates had accessed these questions and rote learned optimal responses – an outcome that would obviously compromise the efficacy of the assessment process.

50. It was acknowledged in *Tsai* that the prejudice identified could be avoided by GU creating an entirely fresh set of novel assessment items for all future exams. This would, however, impose on GU a level of expense and inconvenience that is unreasonable in the circumstances. Relevant questions comprise clinical scenarios and 'mini cases' of some considerable complexity. It was accepted that rewriting them in entirety would entail a relatively substantial investment of time, cost and effort – in other words, a not insignificant commitment of what are, at least in part, public resources.

51. The Queensland Commissioner observed that GU already provides students with various means of obtaining examination feedback and contesting grading decisions. Even if it did not, requiring GU to incur such expenditure would be unjustified, and contrary to the clear public interest in ensuring that agencies such as GU manage public resources efficiently and effectively.

52. The Queensland Commissioner was satisfied that the factors favouring disclosure were outweighed by the public interest in avoiding prejudice to GU's examination methods,

and safeguarding GU's capacity to administer those examinations as efficiently and effectively as possible.

53. The Queensland Commissioner concluded [at 22] that "ensuring that GU can continue to deliver these outcomes in a fiscally prudent and cost-effective fashion is an important public interest, and one that should be preferred to any considerations favouring disclosure of the disputed information."

54. In the present case, the complainant argues that disclosure will allow parents to discuss the content of the tests and the teachers' marking. He argues that this will lead to an improvement in the quality of the tests, the marking of the tests and the quality of science teaching at the School.

55. As conceded by the agency, I accept that teachers are not infallible and that mistakes do occur. However, I am satisfied that, where appropriate, the School already agrees to discuss academic issues with parents. This is illustrated by the meeting which the School held with the complainant's wife and the science teacher. The School also offered to meet with the complainant.

56. I accept that it is in the public interest that parents have a contribution to students' learning. However, I do not consider that the complainant has established that there is a public interest in parents being able to debate the content of each test and the teachers' marking of each individual test.

57. In particular, I do not consider that the complainant has shown that the quality of the tests is such that parental debate, of the kind contemplated by the complainant, would significantly affect the quality of the tests or their marking and thus add to a student's education. Further, it is clear from the complainant's submissions that he would seek to subject exam questions to the kind of informal collateral disagreement noted in *Re Redfern.* As noted in that case, this would undermine the finality of the assessment and review process. I agree that this would be contrary to the public interest.

58. The agency has explained that one reason why the same test questions are used is to assist in comparing results against a similar cohort of students. I do not consider that this is an unreasonable objective. The agency has also commented on how some tests are subject to a form of external moderation, as occurred in *Re Simonsen*.

59. I have considered the complainant's criticisms of the standard of teaching in the science department. However, in contrast to that anecdotal evidence, I observe that in 2013, the School was a very highly ranked school in stage 3 Year 12 exams. I have also taken into account that the tests are already subject to some form of external moderation.

60. *Re Redfern* also noted that the 'most important ground for exemption' was based on the equivalent of clause 11(2), which was that there was no apparent 'countervailing public interest' which would dictate that the interests of disclosure of other students' responses should outweigh their non-disclosure.

61. I do not consider that the complainant has established that, on balance, disclosure of the disputed information is in the public interest.

62. For the reasons given above, it is my view that the disputed information is exempt under clause 11(1)(a) of Schedule 1 to the FOI Act. I am also of the view that disclosure of the disputed information is not, on balance, in the public interest under clause 11(2).

CONCLUSION

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

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