

SIMONSEN AND ECU

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

**File Ref: S0393 & 94013
Decision Ref: D01094**

Participants:

Glenn Jeffrey Simonsen
Applicant

- and -

Edith Cowan University
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - examination papers, scripts and marking sheets for certain units - Bachelor of Nursing - documents of an agency - request for a "class" of documents - clause 11(1)(a) and clause 11(1)(b) - whether disclosure could reasonably be expected to prejudice effectiveness of procedures or methods of conduct of examinations - meaning of "prejudice" - public interest factors - public interest in vocational competence outweighs public interest in disclosure.

Freedom of Information Act 1992 (WA) ss.12(1)(e); 16(1)(d); 16(1)(g); 16(2); 18(1) & (4); 30; 40(1)(a); 70(3); 75; 76(3); Schedule 1 clauses 11(1)(a) and 11(1)(b).

Freedom of Information Act 1982 (C'wlth) ss.40(1)(a); 40(1)(b).

Edith Cowan University Act 1984. s.7.

Freedom of Information Regulations 1993 (WA) Regulations 3, 4, 5, 6, Schedule to Regulations Item 1.

Re Ascic and Australian Federal Police (1986) 11 ALN N184.

News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR 550.

Re Kobelke and Minister for Planning and Others (Information Commissioner WA, 27 April 1994, unreported).

DECISION

The decision of the agency of 10 February 1994 is confirmed. The documents are exempt under clause 11(1)(a) of Schedule 1 to the FOI Act.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13th July 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner arising from a decision of Edith Cowan University ('the agency') to refuse Mr Simonsen ('the applicant') access to documents described as examination papers, scripts and marking sheets for certain units of the Bachelor of Nursing Course conducted by the agency.
2. On 1 November 1993 the applicant formally applied to the agency for access to these particular documents under the *Freedom of Information Act 1992* ('the FOI Act'). On 29 November 1993, the applicant applied to the Information Commissioner for an abridgement of the time permitted under the FOI Act within which the agency was required to deal with his access application. The applicant claimed that he had not received a response from the agency since lodging his application.
3. Inquiries by my office established that the agency construed the initial request as an application for non-personal information. The agency had neither processed the application nor advised the applicant of the requirement to pay the application fee of \$30. The applicant subsequently disputed the agency's view that the request was for non-personal information. However, after a meeting with my office the applicant agreed that part of his request was for access to non-personal information and he agreed to lodge a new application with the appropriate fee.
4. The applicant re-submitted his request to the agency on 21 December 1993, together with the \$30 fee and requested access to documents additional to those identified in his first application. The applicant again sought an abridgement of time for the agency to deal with the matter. My office subsequently negotiated a period suitable to both parties and the agency agreed to provide a decision by 28 January 1994.
5. On 28 January 1994, the agency refused access to the documents, claiming they were exempt under clause 11 of Schedule 1 to the FOI Act. Although the agency refused to provide copies of the documents as requested by the applicant, it did offer the applicant inspection of his own examination papers in order that he might discuss his examination performance with staff of the agency and obtain constructive feedback. This is said by the agency to be in accordance with its established policy and procedure. Because the applicant sought to be provided with copies of the documents and the agency decided to allow inspection only, in accordance with s.27(2) of the FOI Act, the agency has refused the applicant access to the documents in the particular way requested.

6. On 28 January 1994 the applicant exercised his right of internal review. The decision on internal review ('the review decision') was given by Mr Warren Snell, Executive Director (Administration) of the agency, on 10 February 1994. The review decision confirmed the first decision that the documents were exempt under clause 11 and identified the public interest factors which the agency said weighed against disclosure of the documents. On 15 February 1994 the applicant lodged a formal request to me for external review of the review decision.

THE REVIEW PROCESS

7. On 17 February 1994, I advised the agency that I had accepted the applicant's request for external review and, in accordance with my powers under s.75 of the FOI Act, sought production to my office of the documents in dispute. As it is early days for the administration of FOI in Western Australia, I considered it necessary to examine the disputed documents, in order to properly assess the agency's claim that they were exempt. The examination of disputed documents enables my officers to review and consider each of the documents in dispute, and possibly identify sources of additional relevant information that may not be apparent from a mere description of the relevant documents. This process also allows my officers to verify that the documents provided are the ones to which access is sought.
8. In addition, I sought from the agency a schedule listing the documents, briefly describing each document and identifying each of the exemptions claimed with respect to each discrete document. The agency had treated the application as a request for a "class" of documents, namely, examination papers. However, it was clear from the terms of the access application that several different types of documents were sought. In my view, the preparation of a schedule at the beginning of the decision-making process could have assisted the agency to discharge its obligations under s.30 of the FOI Act. Section 30 requires an agency to make a decision with respect to each document identified as coming within the scope of the access application. The schedule and the documents to which access had been refused were provided to me on 24 February 1994.
9. The agency confirmed that it had refused to provide the applicant with copies of the requested documents and referred me to the case of *Re Ascic and Australian Federal Police* (1986) 11 ALN N184, a decision of the Federal Court, which the agency claimed was relevant to the matter before me.
10. The schedule and a copy of *Ascic's* case were provided to the applicant by my office on 25 March 1994 and he was invited to make any further submissions in answer to the agency's claims for exemption. The applicant subsequently provided me with a further submission on 29 March 1994. The agency was also given a copy of the applicant's request for external review in which the applicant had raised matters relevant to the public interest in support of his claim for

- access. The agency was provided with an opportunity to comment on these matters and a further submission was received on 31 March 1994.
11. The process of exchanging submissions, and keeping both parties to a complaint fully informed, is an essential part of the review procedures adopted by my office. This process may have the effect of extending the statutory period for decision making under s.76(3). However, s. 70(3) of the FOI Act obliges me to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to me. I am not prepared to make a decision without the benefit of all the relevant information I consider necessary to discharge my statutory obligations under the FOI Act.
 12. One of my officers subsequently attended at the agency and discussed with the decision-maker the agency's exemption claims and the further information I required in order to enable me to make a decision on the complaint. That information was subsequently requested in writing and some additional information was provided to me by the agency on 15 April 1994. However, the information provided was insufficiently detailed for my purposes and further information was provided by the agency on 23 May 1994, together with advice that the agency had withdrawn its claims for exemption for the documents comprising examination papers for 2 of the relevant units of study (see paragraph 17 below).
 13. I formed a preliminary view that, of the documents relating to the remaining 5 study units, the examination question papers may be exempt, but that some other documents, in particular the separate answer sheets associated with the question papers, were not exempt. On 31 May 1994 my preliminary view was conveyed to the applicant, together with advice that the agency had agreed to grant access to the answer sheets. The applicant was invited to reconsider his complaint in light of my preliminary view. However, he decided to maintain his complaint against the agency's decision in respect of all the requested documents and he requested that I proceed to a formal decision on his complaint. By letter dated 31 May 1994 and received in my office on 1 June 1994, the applicant claimed that the matter had ramifications not only for himself but for all tertiary students in Western Australia, and confirmed his request for the matter to proceed to a formal decision.

THE DISPUTED DOCUMENTS

14. After discussing his access application with him the agency confirmed that the applicant sought 4 documents in relation to each unit of study appearing on his academic record, namely: the examination paper, examination answer booklet, computer marking sheet (bearing the applicant's answers to multiple choice questions) and the examiner's marking key. In respect of Nursing Practice Units only he sought access to perceptor student evaluations and gradings. He also sought access to similar records in respect of the remaining units he would be required to complete as part of the Bachelor of Nursing course.

15. The schedule provided by the agency, at my request, identified and listed 11 units of the study course to which this application related. Two of the units required both mid-term and end-of-year examinations, making a total of 52 possible documents. Of these, the agency told me that some of the particular types of documents requested by the applicant did not exist. The agency identified 25 remaining documents in existence that were within the ambit of the applicant's request and denied access to copies of those documents. Relevant documents for one unit were placed in the Churchlands Campus library and the agency subsequently withdrew its claim for exemption with respect to those documents.
16. The FOI Act creates a right of access to documents of an agency, but an agency is not required to create a document in order to satisfy an access application, where no such document exists. For this reason, the applicant's request for examination papers relating to the units which he might complete at some time in the future was not within the scope of the FOI Act because those documents do not yet exist. Following discussions between my office and the applicant on this issue he agreed not to pursue access to those documents.
17. The disputed documents were narrowed to the documents specified in paragraph 14 above in seven units of study described by the agency by a code as NST 1101, NNT 1210, NSP 1210, SCN 2310, NNI 2101, NNT 2310 and NST 2204. Due to a subsequent change in the staff teaching the units SCN 2310 (Semester 2, 1992) and NST 2204 (Semester 1, 1993), the agency withdrew its claim for exemption for the papers for those units.
18. Following further discussions with my office, the agency abandoned its claims for exemption for the following documents: all the requested computer marking sheets; the only requested examiner's marking key that was available; the requested student perceptor evaluations; and those of the requested examination answer booklets that contained the applicant's answers only and did not contain questions. In respect of the requested examination booklets that contained both questions and the applicant's answers, following further discussions with my office, the agency maintained its claim for exemption for the examination questions, but agreed to grant access to those booklets after deleting the questions.
19. At the end of this process of negotiation, the agency agreed to grant access to all documents identified as being within the ambit of the access application other than those documents or parts of documents containing the examination questions for the following units : NST 1101, NSP 1210, NNT 1210, NNI 2101 and NNT 2310, for which the agency maintained its claim for exemption. It is those documents only that are the subject of this decision.

THE EXEMPTIONS

20. The agency claimed the documents were exempt under clause 11(1)(a) and (b) of Schedule 1 to the FOI Act. Clause 11 provides:

"11. Effective operation of agencies

Exemptions

- (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;*
 - (b) *prevent the objects of any test, examination or audit conducted by an agency from being attained;*
 - (c) *have a substantial adverse effect on an agency's management or assessment of its personnel; or*
 - (d) *have a substantial adverse effect on an agency's conduct of industrial relations.*

Limit on exemptions

- (2) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

21. *Asic's* case is relevant law on this point. The documents dealt with in that case consisted of examination papers containing true/false questions, multiple choice questions, short written essay type questions, marking guides and brief-writing scenarios. There was evidence that the questions were held in a secure examination bank and were recycled on a regular basis. This process of examination was designed to test the professional competence of students and to avoid rote learning which it was said, could give students a false estimate of their knowledge and abilities.
22. The documents in *Asic's* case were held to be exempt under corresponding provisions in the *Freedom of Information Act 1982* (Commonwealth), namely, s.40(1)(a) and (b). Section 40(1)(a) provides, *inter alia*, that a document is an exempt document if its disclosure could reasonably be expected to **prejudice** the effectiveness of procedures or methods for the conduct of examinations.
23. The meaning of "could reasonably be expected to prejudice" was considered by all the judges in *News Corporation Limited v National Companies and Securities Commission* (1984) 57 ALR 550. Woodward J. said, at page 561:

"...I think that the words "would, or could reasonably be expected to...prejudice" mean more than "would or might prejudice". A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring...In my view it is reasonable to expect an event to

occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draughtsman, it is in that general sense that the phrase should be read."

24. The Concise Oxford Dictionary defines "prejudice" as meaning, *inter alia*, "harm or injury that results or may result from some action or judgement"; the same source defines "impair" as meaning "to damage or weaken". In my view, the requirements of clause 11(1)(a) and s. 40(1)(a) are substantially the same. To establish the exemption under clause 11(1)(a) the agency must show that disclosure of the documents in dispute could pose more than a possibility or risk of damage to the effectiveness of its methods or procedures for conducting examinations.
25. The requirements under clause 11(1)(b) are more problematic. To establish this exemption the agency must show that it is reasonable to expect that disclosure of these documents could prevent the attainment of the objects of examinations, namely, testing vocational competence of students, from being realised. The equivalent provision in the Commonwealth FOI legislation requires only that the objects of examinations be prejudiced.

THE CLAIMS OF THE AGENCY

26. Pursuant to s. 7 of the *Edith Cowan University Act 1984*, the agency is charged with the responsibility of, *inter alia*:
 - (a) providing courses of study to meet the needs of the community of this State;
 - (b) encouraging the development and improvement of tertiary education; and
 - (c) supporting and pursuing research and scholarship.
27. It was submitted that in meeting these objectives, the agency uses various examination methods as part of the student performance appraisal process. I was informed by the agency that advice on the matter of data/item bank examination questions has been provided to the agency by Professor David Andrich, Professor of Education, Murdoch University in the following terms:

"The class of educational tests that the University is concerned with is those that are constructed and used by academics in the assessment of students in their courses. The generic types of items which can appear in these test [sic] include:

 - (i) *multiple choice of a variety of kinds;*
 - (ii) *extended deductive solution of a problem in symbolic form;*
 - (iii) *discursive short answer; and*
 - (iv) *essay.*

The list above is essentially in the order of difficulty in constructing questions and in the order in which secure banks should be permitted. Sound multiple choice items are difficult to construct, as are problem-solution and some short answer questions, and in order to enhance efficient and valid assessment, it is important that those that are sound can be used more than once."

28. The agency explained that, in constructing some 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 agency was not able to provide accurate statistics on the use and frequency of use of each examination paper in dispute, from the material available to me, I am able to discern that the general practice adopted by the agency's examiners is to re-use or re-work the questions from examination to examination.
29. The impairment to this method of examination which the agency said could reasonably be expected to follow from disclosure of the documents was:
 - (i) the construction of new questions would successively become more difficult to prepare, time-consuming and costly for the agency to administer;
 - (ii) supplementary or deferred examinations would be less effective; and
 - (iii) the rigour of the process of examination would be less effective over time.
30. The agency claimed that it was not in the public interest to disclose the disputed documents because:
 - (i) the current system encourages the student to develop a full understanding of the content of the course, including current procedures and practices in the nursing profession;
 - (ii) it would result in rote learning of answers which is an inappropriate method of establishing the full capabilities of a student; and
 - (iii) it would require additional work in generating questions and put at risk all other examination papers of a similar type in the University.
31. The agency claimed there is a public interest in nurses possessing vocational competence, in the interests of patient health and safety, and this was not outweighed by the applicant's individual right of access.

THE APPLICANT'S SUBMISSION

32. In his submission in support of his right of access under the FOI Act, the applicant denied the relevance of *Ascic's* case because of the different wording of clause 11(1)(a). However, I am satisfied that the terms "prejudice" and "impair" have substantially the same meaning, that is, to damage or to weaken. On that basis, in my view, *Ascic's* case is both relevant to this matter and persuasive authority which ought to be given due consideration, although I am not bound by that decision.
33. The applicant claimed that the agency did not have a uniform policy on disclosure of information about examinations since the practice varied within the various schools of study. He also claimed that the policy within the School of Nursing was inconsistent with the FOI Act which provided for a variety of forms of access including inspection or by providing a copy of the relevant documents.
34. Although his reasons for seeking access are not relevant, the applicant chose to state that his reasons were:
 - (i) to have a full picture of his academic performance based on results recorded;
 - (ii) to enhance feedback and study methods based on results recorded;
 - (iii) to encourage confidence that the marking criteria and evaluation are consistent between examiners;
 - (iv) to prevent allegations of possible bias or impropriety;
 - (v) to ensure that personal information is accurate, complete, up to date and not misleading; and
 - (vi) to exercise his rights of review according to established University appeal procedures.

FINDINGS

35. I am satisfied, from an examination of the documents in dispute and the inquiries conducted at the agency, that the agency maintains a secure item bank of examination questions which form the basis for student assessment in the relevant units in the School of Nursing. I am also satisfied that the method of examination, namely: multiple choice, short answer and essay questions, accords with accepted standards of examination and that the procedures in place in the agency are designed by professionals for the purpose of testing the vocational competence of students.
36. I recognise the public interest in ensuring that health professionals, such as nurses, are adequately trained and experienced to perform their duties which involve the health and safety of patients. I also recognise a public interest in relying on universities to maintain a standard of education which ensures graduates possess the knowledge and skills which a degree confers.

37. In my view, having considered the method of construction of the examination papers the subject of this complaint, 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 agency, 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, I accept that the effectiveness of this method of testing student competency will be reduced and that such an effect is an impairment to that system.
38. Whilst it may be possible for the agency to devise new questions for each successive examination to reduce the adverse effects of disclosure, I accept the agency's claim that developing suitable questions, which accord with recognised practices of question construction, is difficult and time consuming and, in my view, in any event there is a limit to this procedure unless the knowledge base or curriculum changes substantially. Therefore, on the basis of all the evidence before me, including the submissions of the agency and the applicant, I am 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 that new methods of testing may need to be developed by the agency.
39. I accept the applicant's submission that there is a public interest in students *"having a full picture of [their] academic performance based on results recorded"* and being able to seek and receive feedback on their performance in order to enhance study methods and future performance. However, I consider that those public interest factors are satisfied by the agency's existing policy and practices with respect to post-examination consultation. These include an opportunity to sight relevant papers but not to copy them. On this basis there is no inconsistency, in my view, between existing practices and the FOI Act which is a supplement to other procedures of access to information within agencies.
40. Although there is a public interest in the applicant being able to exercise his rights under the FOI Act, in my opinion 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.
41. The applicant has not demonstrated to me any other public interest which favours disclosure of these documents. His right to access personal information does not include the disputed documents as they do not contain any personal information about the applicant.
42. For these reasons I find that the agency's claim is justified and the documents are exempt under clause 11(1)(a) of Schedule 1 to the FOI Act. It is not, therefore, necessary that I decide the claim for exemption under clause 11(1)(b).

THE APPLICATION FEE

43. An additional matter complained of by the applicant in his application for external review concerned the agency's decision that he pay a \$30 application fee before the agency would deal with his application. Although I am not satisfied that this decision of the agency is a "decision" which is reviewable by me, I make the following comments.
44. The applicant had paid the fee and in his complaint to me sought waiver and reimbursement of that fee on two bases. Firstly, he claimed that the documents bear his name and student number and, therefore, are personal information for which no fee or charge is payable. Secondly, the applicant claimed to be impecunious and cited a particular circumstance (which, in consideration of the applicant's personal privacy, I shall not detail) claimed to support his assertion that he is impecunious.
45. In respect of the first basis of this claim, I accept that some of the documents identified as the subject of the access application ('the requested documents') contain personal information about the applicant. As I have stated in a previous decision (See: *Re Kobelke and Minister for Planning and Others*, 27 April 1994, unreported), normally more than just a person's name is required in order that particular matter be characterised as personal information about that person. Some of the requested documents in this case reveal the applicant's name and student number and his performance in particular examinations taken by him. I accept that that information may be personal information about the applicant. However, some of the documents (for example, some of the question sheets) do not bear the applicant's name or student number or any other information about him. Some others bear the applicant's name and student number but contain no other personal information, and they do contain a substantial amount of non-personal information.
46. No application fee is payable for personal information about the applicant. Section 12(1)(e) of the FOI Act provides that any application fee payable under the regulations must be lodged with an access application. Regulation 4 and item 1 of the Schedule to the *Freedom of Information Regulations 1993* ('the regulations') prescribe an application fee of \$30 for non-personal information. There is no application fee prescribed for an application for access to personal information about the applicant. Further, section 16(1)(d) provides that no charge may be made for providing an access applicant with access to his or her personal information.
47. I am satisfied, on an examination of both the access application and the requested documents, that the applicant's request related to both personal information and non-personal information. On that basis, in my opinion, the agency was justified in charging the application fee.

48. In respect of the applicant's claim that the fee should be waived because he is impecunious, I make the following observations. Section 12(1) of the FOI Act provides that an access application has to be, *inter alia*, lodged at the agency "...with any application fee payable under the regulations." Regulation 4 and item 1 of the Schedule to the *Freedom of Information Regulations 1993* ('the regulations'), read together, provide that the prescribed application fee payable under s.12(1) of the FOI Act for non-personal information, is \$30.
49. Section 16(1) of the FOI Act, together with regulation 5, provides that certain other charges specified in the Schedule to the regulations may also be imposed. Section 18(1) and (4) and regulation 6 allow an agency to require payment of a deposit calculated in accordance with item 3 of the Schedule to the regulations. Regulation 3 provides that where an applicant is impecunious in the opinion of the agency, or is the holder of a pensioner concession card, the charge payable under regulation 5 is reduced by 25%.
50. There is no provision for reduction or waiver of the application fee under regulation 4. Section 16(1) of the FOI Act prescribes the principles by which "[a]ny charge that is, in accordance with the regulations, required to be paid by an applicant before access to a document is given, must be calculated...". Section 16(1)(g) provides that a charge must be waived or reduced if the applicant is impecunious.
51. However, having considered the wording of that section and, in particular, s.16(2) which provides that (subject to the provision relating to payment of advanced deposits) "...payment of a charge will not be required before the time at which the agency has notified the applicant of the decision to grant access to a document", I am of the view that s.16 refers to charges other than the application fee which is required under s.12(1)(e) to be paid at the time of lodging the access application.
52. The fee for an application relating to non-personal information is \$30 and this fee must be lodged with the access application. In my opinion, there is no provision in the FOI Act that entitles an applicant to a waiver or reduction of this fee if the applicant is impecunious. I consider that the application fee of \$30 was properly charged in this case.
