



Decision and Reasons for Decision

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| Citation: | <i>Tsai and Griffith University</i> [2014] QICmr 39 (16 October 2014) |
| Application Number: | 311947 |
| Applicant: | Tsai |
| Respondent: | Griffith University |
| Decision Date: | 16 October 2014 |
| Catchwords: | ADMINISTRATIVE LAW – RIGHT TO INFORMATION – REFUSAL OF ACCESS – CONTRARY TO PUBLIC INTEREST INFORMATION – exam materials and marking guides – whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b), 49 and schedule 4 of the <i>Right to Information Act 2009</i> (Qld). |

REASONS FOR DECISION

Summary

1. The applicant applied to Griffith University (**GU**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for copies of exam papers and marking guides relating to exams sat by him in GU's School of Medicine.
2. GU located various pages, refusing access to 53 in part and 31 in full. The information to which access was refused comprised exam questions and marking guides.¹ Access was refused on the basis disclosure would, on balance, be contrary to the public interest.
3. GU's decision is affirmed. Disclosure of the requested information could reasonably be expected to prejudice the effectiveness of GU's examination methods in the School of Medicine. Disclosure would, on balance, be contrary to the public interest.

Background

4. Relevant steps taken in this matter are set out in the Appendix to this decision.

Reviewable decision

5. The decision under review is GU's decision dated 12 February 2014.

¹ Access was also refused to a limited amount of information – the names of assessors – appearing on several of the partially refused pages, on the basis it was personal information, disclosure of which would, on balance, be contrary to the public interest. The applicant did not seek review of GU's decision in this regard: external review application dated 20 February 2014.

Evidence considered

6. Evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including footnotes and Appendix).

Information in issue

7. The '**Information in Issue**' consists of parts of 53 pages² and 31 full pages, comprising School of Medicine exam questions and associated marking guides.

Relevant law

8. Under the RTI Act, an individual has a right to access documents of an agency,³ subject to certain limitations, including grounds for refusal of access. Access may be refused to information the disclosure of which would, on balance, be contrary to the public interest.⁴
9. The RTI Act identifies many factors that may be relevant to deciding the balance of the public interest and explains the steps that a decision-maker must take in deciding the public interest, as follows:⁵
 - identify any irrelevant factors and disregard them
 - identify any relevant public interest factors favouring disclosure and nondisclosure⁶
 - balance the relevant factors favouring disclosure and nondisclosure; and
 - decide whether disclosure of the information would, on balance, be contrary to the public interest.

Findings

10. Following the above steps, I have not taken irrelevant factors into account.

Factors favouring disclosure

11. As to factors favouring disclosure, it is reasonable to expect that disclosure of the Information in Issue would enhance GU's accountability for the assessment and grading of its students.⁷ Disclosure to the applicant – who sat relevant examinations – would also provide him with contextual and background information used by GU in awarding him particular grades, thus arguably permitting him to better understand those grading decisions.⁸
12. The applicant also submitted that obtaining access to the Information in Issue would assist him in his learning. I accept 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

² Excluding assessor names claimed to be personal information – see note 1.

³ Section 23 of the RTI Act.

⁴ Sections 47(3)(b) and 49 of the RTI Act.

⁵ Section 49(3) of the RTI Act.

⁶ Schedule 4 to the RTI Act sets out non-exhaustive lists of factors favouring disclosure and nondisclosure, and public interest harm factors.

⁷ Schedule 4, part 2, item 1 of the RTI Act.

⁸ Schedule 4, part 2, item 11 of the RTI Act.

the applicant to compare his answers against 'model' answers in the marking guides, disclosure could assist in advancing this public interest.

Factors favouring nondisclosure

13. I do not, however, accept that the above public interest considerations are sufficient to displace the deleterious public interest consequences that could reasonably be expected to follow disclosure of the Information in Issue. The 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.⁹ Unconditional release of a particular set of questions or assessment items¹⁰ – such as those contained in the Information in Issue – could therefore reasonably be expected to prejudice this examination method or procedure.¹¹ 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.¹²

Applicant's submissions

14. The applicant disputes the likelihood of the risk noted in the preceding paragraph, and contends that, in any event, GU could simply develop new questions so as to avoid any potential prejudice to future examination processes – a step that ought not to pose a burden sufficient to influence public interest considerations in this case. I do not agree, on either point.¹³
15. While I do not wish to overstate the risk that candidates may access the questions contained in the Information in Issue, rote learn responses, then encounter those 'recycled' questions in future exams, I nevertheless consider it reasonable – and not 'irrational, absurd or ridiculous'¹⁴ – to anticipate such an outcome.
16. As for the applicant's second argument, I acknowledge that the prejudice identified in paragraph 15 could be avoided by GU's 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

⁹ Questions are 'banked', and each exam features a mix of new and 'recycled' questions drawn from this bank: GU submissions dated 3 July 2014.

¹⁰ As would occur if the Information in Issue were to be released under the RTI Act. In this regard, it is relevant to note that during the course of this review GU offered to provide the applicant with face-to-face feedback on his exam performance, and to allow the applicant to inspect the Information in Issue; a limited form of disclosure (as against provision of copies) that would have essentially satisfied the public interest considerations canvassed in paragraphs 11-12, whilst largely preserving the secrecy in the information and thus avoiding negative public interest consequences. The applicant declined this offer.

¹¹ Schedule 4, part 4, section 3(a) of the RTI Act. The phrase '*could reasonably be expected to*' requires an objective consideration of all the relevant evidence and consideration of whether the expectation is reasonably based. A reasonable expectation is not irrational, absurd or ridiculous. *Sheridan and South Burnett Regional Council and Others* [2009] QICmr 26 (9 April 2009) at paragraphs [189] – [193], referring to *Attorney-General v Cockcroft* (1986) 64 ALR 97.

¹² And thus prejudice the attainment by GU of the objects of future examinations in the relevant course, also a public interest harm: schedule 4, part 4, section 3(b) of the RTI Act. GU cited additional harm factors - schedule 4, part 4, sections 7(1)(a) and (b) – in support of its case for refusal of access; the thrust of its submissions in support of each was, however, essentially as I have described in this paragraph; that if disclosed, GU '*...would not be able to reuse [the Information in Issue] in subsequent examinations...*' (submissions dated 3 July 2014). These concerns are adequately accommodated by the harm factor embodied in schedule 4, part 4, section 3(a) of the RTI Act.

¹³ Submissions dated 3 September 2014, the applicant on the first point arguing that '[a]s students do not know which assessment pieces from which examinations may be re-used...the notion of rote learning the assessment material becomes moot as it is easier to develop a thorough understanding of the material...than to rote learn.'

¹⁴ Bearing in mind that the test imposed by the words 'could reasonably be expected to' is not one requiring absolute proof, but reasonable expectation: note 11.

complexity. GU submits¹⁵ – and I accept – 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. GU already provides students with various means of obtaining examination feedback and contesting grading decisions.¹⁶ 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.

17. In reaching the conclusions expressed in the preceding paragraph, I have considered carefully the authority cited by the applicant in support of his case for access.¹⁷ This comprises the decision of the Supreme Court of Victoria in *University of Melbourne v McKean*,¹⁸ affirming a decision of the Deputy President Dwyer of the Victorian Civil and Administrative Tribunal (**Tribunal**),¹⁹ that marking guides relating to the exams in two finance subjects were not exempt from disclosure under that state's freedom of information legislation. I do not, however, consider that either the appeal or first instance decision assist the applicant in this case.
18. The Supreme Court appeal proceedings were not decided on public interest grounds, but on the application of an exemption provision not contained in the RTI Act.²⁰ Accordingly, I cannot see how it can be of any assistance in deciding the present case.
19. While Deputy President Dwyer's decision in the Tribunal did canvass public interest considerations, he was considering information qualitatively distinct from the exam materials in issue in this review. The marking guides in issue in *McKean* related to finance examinations, and the only information requiring alteration so as to permit their reuse was certain 'numbers and examples';²¹ a task the Deputy President conceded may put the respondent university in that case to 'some additional expense or effort,' but not so as to amount to unreasonable effort justifying nondisclosure.²² The Information in Issue before me, however, comprises relatively complex clinical scenarios and 'mini cases,' (and associated marking guidance) the rewriting of which would, as I have noted, require a commitment of resources I consider would be unreasonable in the circumstances of this case.
20. I should also note that *McKean* was decided in a statutory context markedly different to that contained in the RTI Act. Indeed, Deputy President Dwyer expressly remarked that had he been making his decision under legislation such as the RTI Act²³ – and thus had open to him the possibility of finding that disclosure may have prejudiced the

¹⁵ Submissions dated 3 July 2014.

¹⁶ In its submissions dated 3 July 2014, GU advised that students are given the opportunity to attend group feedback sessions, with emphasis on questions students as a whole found difficult. Students are also able to receive individual feedback from academic support staff, during which sessions students may review their exam paper and discuss areas of weakness: submissions dated 3 July 2014. I note that the applicant contends he was not afforded these opportunities; that while feedback was offered after publication of exam results, none eventuated (submissions dated 3 September 2014). I have not sought to resolve this apparent discrepancy in the evidence, for as will be apparent from the balance of my reasons, I do not consider it determinative as to where the balance of the public interest in this case lies.

¹⁷ External review application dated 20 February 2014.

¹⁸ [2008] VSC 325.

¹⁹ *McKean v University of Melbourne* [2007] VCAT 1310 (**McKean**).

²⁰ The issue on appeal to the Court was whether the Tribunal erred in law in deciding that the appellant university's marking guides were not exempt under section 34(4)(c) of the *Freedom of Information Act 1982* (Vic). Section 34(4)(c) of that Act provides that examination documents are exempt from disclosure where the use for which the document was prepared has not been completed. The RTI Act contains no equivalent provision.

²¹ At paragraph [13].

²² As above.

²³ Deputy President Dwyer's reasons (paragraph [24]) refer to section 40 of the former *Freedom of Information Act 1992* (Qld), as his decision in *McKean* issued prior to the repeal of that Act and enactment of the RTI Act. The comments remain relevant, however, as the prejudices against which section 40(a) sought to safeguard – prejudice method for conducting an examination or attaining the objects of an examination – are reflected in the public interest harm factor prescribed in schedule 4, part 4, section 3 of the RTI Act.

effectiveness of testing methods or procedures²⁴ – *'it may have been possible ... for me to make a finding, along such lines.'*²⁵ This is so, even though the only information requiring alteration on the marking guides the Deputy President was considering comprised, as noted, figures and examples – and not the substantively different scenario-based information in issue in this review.

Balancing the public interest

21. Having identified and analysed relevant public interest factors, I am in this case satisfied the factors favouring disclosure identified in paragraphs 11 and 12 are 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.
22. The Information in Issue concerns advanced examinations in a discipline in which assessment rigour and student competency are paramount. 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 Information in Issue.
23. Accordingly, I consider that GU is entitled to refuse access to the Information in Issue, on the basis that disclosure would, on balance, be contrary to the public interest under section 47(3)(b) and 49 of the RTI Act.

DECISION

24. I affirm the decision of GU to refuse access to the Information in Issue under section 47(3)(b) of the RTI Act on the basis that disclosure would, on balance, be contrary to the public interest.
25. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

Jenny Mead
Right to Information Commissioner

Date: 16 October 2014

²⁴ Or prejudicing the attainment of the objects of those examinations.

²⁵ At paragraph [25].

APPENDIX**Significant procedural steps**

| Date | Event |
|------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 20 January 2014 | GU received the applicant's access application under the RTI Act. |
| 12 February 2014 | GU issued its decision on the access application. |
| 25 February 2014 | OIC received the applicant's application for external review of GU's decision. |
| 26 February 2014 | OIC notified GU of the external review application and requested procedural information. |
| 3 March 2014 | GU supplied requested information. |
| 7 March 2014 | OIC notified the applicant and GU that OIC had accepted the application for external review. OIC requested that GU supply a copy of the Information in Issue. |
| 26 March 2014 | OIC received a copy of part of the Information in Issue. |
| 7 April 2014 | OIC advised GU that part of the Information in Issue appeared to be outstanding, and requested supply of same. |
| 17 April 2014 | OIC received the balance of the Information in Issue. |
| 8 May 2014 | OIC wrote to GU, relevantly proposing exam feedback and inspection of the Information in Issue as a means of securing informal resolution of the review, and seeking GU's consent to same. |
| 14 May 2014 | GU agreed to OIC's 8 May 2014 proposal. |
| 22 May 2014 | OIC wrote to the applicant, advising of GU's preparedness to provide him with feedback and grant inspection of the Information in Issue in resolution of the review, and requesting he advise OIC as to whether he agreed to resolve the external review on this basis. |
| 26 May 2014 | The applicant declined to resolve the review on the basis set out in OIC's 22 May 2014 letter. The applicant proposed release under cover of a confidentiality agreement. |
| 5 June 2014 | OIC advised the applicant that the general disclosure scheme contained in the RTI Act did not contemplate imposition of restrictions on information accessed under that scheme. OIC invited the applicant to again consider the 22 May 2014 proposal. |
| 9 June 2014 | The applicant again declined to resolve on the basis of the 22 May 2014 proposal, and asked OIC to proceed with the review. |
| 10 June 2014 | OIC requested GU provide further submissions in support of its decision to refuse access. |
| 8 July 2014 | OIC received additional submissions from GU. |
| 22 August 2014 | OIC provided the applicant with a preliminary view on the issues in this review and invited the applicant to provide submissions in response to the view. |
| 3 September 2014 | The applicant provided submissions in reply to the preliminary view. |