[2015] WASC 276

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	H -v- DEPARTMENT OF EDUCATION [2015] WASC 276
CORAM	**:**	CHANEY J
HEARD	**:**	2 JUNE 2015
DELIVERED	**:**	7 AUGUST 2015
FILE NO/S	**:**	GDA 13 of 2014
BETWEEN	**:**	H Applicant AND DEPARTMENT OF EDUCATION Respondent

ON APPEAL FROM:

Jurisdiction	**:**	INFORMATION COMMISSIONER OF WESTERN AUSTRALIA
Coram	**:**	MR S BLUEMMEL (INFORMATION COMMISSIONER)
File No	**:**	F 051 of 2013

Catchwords:

Freedom of information - Access to school science test paper - Nature of appeal - Public interest

Legislation:

Freedom of Information Act 1992 (WA), s 27(1)(a), s 85(1), sch 1, cl 11

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Applicant	:	In person
Respondent	:	Mr J M Misso

Solicitors:

Applicant	:	In person
Respondent	:	State Solicitor for Western Australia

Case(s) referred to in judgment(s):

A v Corruption and Crime Commissioner [2013] WASCA 288; (2013) 306 ALR 491
Collins v Minister for Immigration and Ethnic Affairs (1981) 58 FLR 407
Federal Commissioner of Taxation v McCabe (1990) 26 FCR 431
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR 332
Osland v Secretary to the Department of Justice [No 2] [2010] HCA 24; (2010) 241 CLR 320
O'Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210
Paridis v Settlement Agent Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361
Re H and Department of Education [2014] WAICmr 21
Re James and Australian University [1984] AATA 501; (1984) 2 AAR 327
Re Redfern and University of Canberra [1995] AATA 200; (1996) 66 FoI Review 80
Re Simonsen and Edith University [1994] WAICmr 10

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) [2001] HCA 49; (2001) 207 CLR 72
Tsai and Griffith University [2014] QICmr 39
Vagh v The State of Western Australia [2007] WASCA 17

1 **CHANEY J**: The appellant brings this appeal pursuant to s 85(1) of the *Freedom of Information Act 1992* (WA) (the Act) seeking to set aside a decision of the Information Commissioner to refuse the appellant access to questions on a chemistry test paper (the test) that his daughter had completed at Perth Modern School (the school) in August 2012.

Background

2 On 9 November 2012, the appellant applied to the respondent, the Department of Education, for access to the test.

3 On 21 December 2012, the respondent determined that, pursuant to s 24 of the Act, it would provide the appellant with access to his daughter's answers to the test (test answers) but with the questions redacted. The respondent concluded that the test was exempt matter under cl 11(1)(a) and (b) of sch 1 to the Act which provide:

> (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 an agency from being attained;

and that cl 11 (2) of sch 1 did not apply. Clause 11(2) provides:

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

4 On that same day, the appellant applied, pursuant to s 39 of the Act, for internal review of the respondent's decision. On 24 December 2012, the respondent confirmed its decision to provide access to the test answers with the questions redacted.

5 On 25 February 2013, the appellant applied to the Information Commissioner (Commissioner) for external review of the decision to not provide access to the test. Following preliminary and supplementary preliminary views, the Commissioner ultimately published his final decision on 14 November 2014.[1] The Commissioner found that the test was exempt matter under cl 11(1)(a) of sch 1 to the Act and that disclosure of the test was not, on balance, in the public interest so that cl 11(2) of sch 1 to the Act did not apply. Therefore the Commissioner

[1] ***H and Department of Education*** [2014] WAICmr 21.

confirmed the respondent's decision.[2] Pursuant to s 102(3) of the Act, the onus of establishing that cl 11(2) of sch 1 to the Act applied was on the appellant.

6 In this appeal, the appellant challenges both the Commissioner's finding that cl 11(1)(a) applies to the test and his conclusion that cl 11(2) does not apply.

Questions of Law

7 Section 85(1) of the Act provides that an appeal lies to this Court on any question of law arising out of any decision of the Commissioner relating to an access application. Section 85 confers original jurisdiction in the nature of judicial review, as opposed to appellate jurisdiction.[3]

8 In ***Paridis v Settlement Agent Supervisory Board***[4] (***Paridis***) Buss JA, with whom Wheeler and Pullin JJA agreed, explained what an appeal on a question of law entails. An appeal on a question of law is narrower than an appeal that merely 'involves a question of law', and does not include questions of mixed law and fact.[5] Assertions that a decision is against the evidence, or the weight of evidence, do not raise questions of law.[6] Finding facts wrongly or upon a doubtful basis is not an error of law.[7]

9 However there will be an error of law if a decision maker has made a finding which is manifestly unreasonable in the sense that no reasonable decision maker could have made that finding.[8] The concept of unreasonableness was explained in ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18; (2013) 249 CLR 332, where Hayne, Kiefel and Bell JJ said:

> In ***Sharp v Wakefield***, it was said that when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice. That is what is meant by 'according to law'. It is to be legal and regular, not arbitrary, vague and fanciful. The discretion must be 'exercised within the limit, to which an honest man competent to the

[2] ***Re H and Department of Education*** [2014] WAICmr 21 [63].
[3] ***Osland v Secretary to the Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320 [18] (French CJ, Gummow & Bell JJ); ***Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)*** [2001] HCA 49; (2001) 207 CLR 72 [15] (Gaudron, Gummow, Hayne & Callinan JJ).
[4] ***Paridis v Settlement Agent Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361.
[5] ***Paridis v Settlement Agent Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [53].
[6] ***Paridis v Settlement Agent Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [54], citing ***Collins v Minister for Immigration and Ethnic Affairs*** (1981) 58 FLR 407, 410 .
[7] ***Paridis v Settlement Agent Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [55].
[8] ***Paridis v Settlement Agent Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [56], citing ***Federal Commissioner of Taxation v McCabe*** (1990) 26 FCR 431, 437.

> discharge of his office ought to confine himself'. It is pointed out in Wade and Forsyth that the legal conception of discretion dates from at least the 16th century. In ***Sharp v Wakefield***, Lord Halsbury LC had referred to ***Rooke's Case*** of 1598, in which it was stated that the discretion of commissioners of sewers 'ought to be limited and bound with the rule of reason and law'.
>
> This approach does not deny that there is an area within which a decision-maker has a genuinely free discretion. That area resides within the bounds of legal reasonableness. The courts are conscious of not exceeding their supervisory role by undertaking a review of the merits of an exercise of discretionary power. Properly applied, a standard of legal reasonableness does not involve substituting a court's view as to how a discretion should be exercised for that of a decision-maker. Accepting that the standard of reasonableness is not applied in this way does not, however, explain how it is to be applied and how it is to be tested. (citations omitted)

Later their Honours concluded that '[u]nreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification'.[9]

10 There will also be an error of law if a decision maker has failed to take into account a relevant consideration that it was bound to take into account. The factors that a decision maker is bound to consider in his or her discretionary value judgment are determined by the subject matter, scope and purpose of the Act.[10]

11 In his written submissions, the appellant described this matter as 'a case about whether parents can access children's school test questions through the' Act. He expressed the belief that 'parents should be able access test papers because children cannot resolve issues arising from test questions alone and parents have a right to know about their children's test performance and this information is important for parents to guide their children'. While that may be the appellant's underlying motivation for the proceedings, and while it may be that considerations of that nature might be relevant to questions of public interest which fall to be considered in the context of cl 11(2) of sch 1 of the Act, the outcome of this case necessarily turns not upon the correctness of that belief, but upon the question of whether or not the Commissioner, in reaching his conclusion, has made an error of law.

---

[9] ***Minister for Immigration and Citizenship v Li*** [2013] HCA 18; (2013) 249 CLR 332 [76].
[10] ***A v Corruption and Crime Commissioner*** [2013] WASCA 288; (2013) 306 ALR 491 [88]; ***Minister for Immigration and Citizenship v Li*** (2013) 249 CLR 332 [23].

Grounds of Appeal

12 The appellant appeals on six grounds which were expressed as follows:

1. The Commissioner's decision for not granting access to the disputed matter is unreasonable;

2. The Commissioner erred by disregarding the official statement issued by the relevant legal authority. (This ground was reformulated in the appellant's written submissions as being that the Commissioner erred in the application of public interest);

3. The Commissioner did not take into account many important factors when he evaluated the public interest of the request;

4. The Commissioner erred when he evaluated the public interest with arbitrary and inconsistent evaluation;

5. The Commissioner included misleading evidence against the appellant's case in his decision; and

6. The Commissioner included an irrelevant piece of evidence in his decision.

Ground 1: The Commissioner's decision for not granting access to the disputed matter is unreasonable

13 The appellant contends that the respondent's decision for not granting access to the test, even if only by inspection pursuant to s 27(1)(a) of the Act, was unreasonable. This submission is based on the proposition that the case for access in this matter is stronger than the case for access in other cases decided by an Information Commissioner or in two cases, the Administrative Appeals Tribunal. Those cases are ***Re James and Australian National University***;[11] ***Re Redfern and University of Canberra***;[12] ***Re Simonsen and Edith Cowan University***;[13] and ***Tsai and Griffith University***.[14]

14 Two things need to be said about reliance on those cases. The first is that, while consistency in administrative decision making is desirable, the cases referred to do not have the effect of binding authority on the

[11] ***Re James and Australian University*** [1984] AATA 501; (1984) 2 AAR 327.
[12] ***Re Redfern and University of Canberra*** [1995] AATA 200; (1996) 66 FoI Review 80.
[13] ***Re Simonsen and Edith University*** [1994] WAICmr 10.
[14] ***Tsai and Griffith University*** [2014] QICmr 39.

Information Commissioner. While the Information Commissioner referred to a number of those cases in reaching his decision, he was not bound to follow any reasoning process which might have been utilised in those decisions. The second is that, in considering those decisions, it is necessary to bear in mind the particular nature of the documents to which access was sought in each case, and the factual context of each case.

15 ***Re James and Australian National University*** did not concern examination or test questions. Rather, the information sought related to five categories of documents which contained information concerning the performance of the students who were applicants. The case concerned the *Freedom of Information Act 1982* (Cth) (Commonwealth Act), and questions of exemption under the now repealed s 40(1) which was in similar terms to cl 11(1) of sch 1 of the Act.

16 ***Re Redfern and University of Canberra*** also concerned s 40(1) of the Commonwealth Act but did not address whether the exam questions document was exempt matter because the University had already provided access.

17 ***Re Simonsen and Edith Cowan University*** is a decision of the Western Australian Information Commissioner concerning an application for access to examination papers, scripts and marking sheets. Whilst the Commissioner did find there was a public interest in the applicant exercising rights under the Act, she ultimately found that this was outweighed by other public interest factors.[15] She concluded that the documents were exempt under cl 11(1)(a) of sch 1.

18 The balance of public interest was similarly against access in ***Tsai and Griffith University***, a decision of the Queensland Information Commissioner concerning access to examination papers and marking guides.

19 Nothing in any of these decisions suggests that the Commissioner's decision in this case can be said to be unreasonable or outside the scope and purpose of the Act. Indeed, the decisions in ***Simonsen*** and ***Tsai*** are consistent with the decision of the Commissioner in this case, even taking into account that they concerned examinations in relation to professional qualifications as distinct from examinations of a year 9 school student.

[15] ***Re Simonsen and Edith Cowan University*** [1994] WAICmr 10 [40].

20 In this case, the Commissioner's decision that the disputed matter fell under cl 11(1)(a) of sch 1 of the Act[16] was premised on the following findings:

- '[D]isclosure 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';[17]

- '[T]here is significant cost to the [s]chool in re-writing tests';[18]

- '[T]he effect of disclosure is likely to…encourage debate by parents and others about each question in each test and the marking of each question in each test';[19] and

- '[G]iving some students an advantage by disclosing previous tests may be equally damaging to the integrity of test results' as is 'plagiarism resulting from disclosure of the disputed documents';[20]

21 The Commissioner concluded that disclosure of the disputed matter would not, on balance, be in the public interest.[21] That conclusion was premised on the following findings:

- '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';[22]

- '[P]reclud[ing] the possibility of relevant questions' future usage' is a 'deleterious public interest consequence';[23]

- 'Rewriting questions involves 'time, cost and effort' that 'are, at least in part, public resources';[24]

[16] ***Re H and Department of Education*** [2014] WAICmr 21 [40].
[17] ***Re H and Department of Education*** [2014] WAICmr 21 [33].
[18] ***Re H and Department of Education*** [2014] WAICmr 21 [35].
[19] ***Re H and Department of Education*** [2014] WAICmr 21 [38].
[20] ***Re H and Department of Education*** [2014] WAICmr 21 [39].
[21] ***Re H and Department of Education*** [2014] WAICmr 21 [61].
[22] ***Re H and Department of Education*** [2014] WAICmr 21 [42].
[23] ***Re H and Department of Education*** [2014] WAICmr 21 [49].
[24] ***Re H and Department of Education*** [2014] WAICmr 21 [50].

- The 'clear public interest in ensuring that agencies…manage public resources efficiently and effectively';[25]

- '[T]he complainant has [not] 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';[26]

- '[T]he quality of the tests';[27]

- '[S]ubject[ing] exam questions to the kind of informal collateral disagreement noted in ***Re Redfern*** … would undermine the finality of the assessment and review process' and be 'contrary to the public interest';[28]

- Using the same test questions to 'assist in comparing results against a similar cohort of students' is not 'an unreasonable objective';[29] and

- '[T]he tests are already subject to some form of external moderation'.[30]

22 In light of those findings the Commissioner's decision to deny access to the disputed matter cannot be said to lack evident and intelligible justification. Nor can it be said that it was unreasonable not to permit inspection pursuant to s 27(1)(a). Both in respect to the considerations under cl 11(1) and in relation to the public interest, the Commissioner made reference to the undesirability of enabling debate by parents in relation to each test undertaken by their child and its marking. Those observations are clearly apposite to inspection under s 27(1)(a) of the Act.

23 Ground 1 is not made out.

Ground 2: The Commissioner erred in the application of public interest

24 Ground 2 essentially asserts that, in considering the question of public interest, the Commissioner failed to take into account a relevant consideration that he was bound to take into account. The consideration that the appellant considers should have been taken into account is a passage on page 37 of a document published by the School Curriculum

[25] ***Re H and Department of Education*** [2014] WAICmr 21 [51].
[26] ***Re H and Department of Education*** [2014] WAICmr 21 [56].
[27] ***Re H and Department of Education*** [2014] WAICmr 21 [57].
[28] ***Re H and Department of Education*** [2014] WAICmr 21 [57].
[29] ***Re H and Department of Education*** [2014] WAICmr 21[58].
[30] ***Re H and Department of Education*** [2014] WAICmr 21 [59].

and Standards Authority entitled 'The Principles of the Curriculum Framework Overarching Statement', which states:

> A primary purpose of assessment is to enhance learning. Another purpose is to enable the reporting of students' achievement. Assessment practices have a powerful impact on learning and teaching. Issues such as what evidence to collect, how to collect it and how to interpret it need to be addressed and *debated widely within the school community*.[31] (emphasis added by appellant)

25 The first thing to be said about this ground is that, while it was no doubt open to the Commissioner to have regard to this passage, I see no basis upon which it could be said that the subject matter, scope or purpose of the Act required the Commissioner to have regard to the particular document in the sense that a failure to do so amounted to a failure to exercise jurisdiction. The appellant's complaint is, in substance, simply that the Commissioner failed to give adequate weight to the reference in the Curriculum Framework to the fostering of debate within the school community. As recognised by McLure P in ***A v Corruption and Crime Commissioner***, a weighting error does not give rise to an appealable error except in very limited circumstances.[32]

26 In any event, even if the Commissioner was bound to consider the Curriculum Framework, the broad statement in the passage set out above is of limited application to the issue before the Commissioner which was the desirability of debate of specific questions and approaches to marking. The Commissioner said:

> 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.[33]

27 The Commissioner did not err in this regard.

28 The appellant made reference to s 11B of the *Freedom of Information Act 1982* (Cth) (the Commonwealth Act) in his written submissions on this ground. The Commonwealth Act does not of course govern that application of the relevant State Act, and the appellant's reliance on s 11B of the Commonwealth Act is misconceived.

---

[31] Appellant's submissions [19].
[32] ***A v Corruption and Crime Commissioner*** [2013] WASCA 288; (2013) 306 ALR 491 [248] citing ***Vagh v The State of Western Australia*** [2007] WASCA 17 [76].
[33] ***Re H and Department of Education*** [2014] WAICmr 21 [56].

29 The appellant also made oral submissions arguing that this ground related to a fair hearing or bias. This was premised on the appellant's belief that his arguments were ignored by the Commissioner. I reject that submission. The Commissioner clearly acknowledged the complainant's submissions.[34] There is nothing to suggest that the Commissioner was biased in making his decision. Nor is there any reason to think that the appellant was not afforded a fair hearing.

Ground 3: The Commissioner did not take into account many important factors when he evaluated the public interest of the request

30 Ground 3 also essentially alleges that the Commissioner failed to take into account relevant considerations that he was bound to take into account.

31 As noted above, an error of law occurs when a decision maker fails to take into account a relevant consideration that it was bound to take into account. As noted in ***Osland v Secretary, Department of Justice (No 2)*** in regard to the *Freedom of Information Act 1982* (Vic), the Act neither defines nor expressly limits the range of matters relevant to the consideration of 'public interest' under cl 11(2) of sch 1 of the Act.[35] The expression 'in the public interest' in the Act 'classically imports a discretionary value judgment to be made by reference to undefined factual matters'.[36]

32 The matters which are said not to have been taken into account are:

1. the rights of students and parents to know their own personal information,

2. the rights of students and parents to correct personal information, and

3. promoting the openness of the school.

33 'Personal information' is defined in cl 1 of the Glossary to the Act as meaning;

> information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

[34] ***Re H and Department of Education*** [2014] WAICmr 21 [17].
[35] ***Osland v Secretary, Department of Justice (No 2)*** [2010] HCA 24; (2010) 241 CLR 320 [13].
[36] ***O'Sullivan v Farrer*** [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson & Gaudron JJ).

> (a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or
>
> (b) who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample.

34 The disputed matter, being test questions, does not constitute 'personal information' as defined. The first and second matters which the appellant complains were not taken into account and have no application in this case.

35 In relation to the third matter, namely 'promoting school openness', the Commissioner made reference to the appellant's argument that disclosure would allow parents to discuss the content of the tests and teachers' marking, and that that would lead to improvement in the quality of the tests and the quality of science teaching at the school. He weighed those arguments in his consideration of the public interest. Even if the matter was a mandatory consideration, which it was not, the appellant has not established any failure to give it consideration.

36 Ground 3 is not made out.

Ground 4: The Commissioner erred when he evaluated the public interest with arbitrary and inconsistent evaluation

37 This ground asserts that the Commissioner did not consider the 'public benefits for all students at the school by releasing all science tests and exams'.[37] However, the Commissioner did consider this at [33] of his reasons.

38 The appellant also asserts that the Commissioner was mistaken when he found that that 'there is a significant cost to the [s]chool in re-writing tests', particularly given that all other departments release questions to students and write new tests each year. The appellant's contention appears to be that such a finding was unreasonable in the sense that no reasonable decision maker could have made it. The appellant supported this contention by producing a table setting out his estimate of time necessary to write and check new test papers, and then comparing the estimated costs of that work to the overall cost to the school of teaching and examining the subject. It is not necessary for this court to assess the reliability of the appellant's calculations. They were prepared no doubt in response to certain figures provided by the respondent to the

[37] Appellant's submissions [27].

Commissioner on the issue of the cost in time and money of preparing new test papers. The figures submitted by both the respondent and the appellant put the cost at tens of thousands of dollars. In my view it cannot be said that describing the cost to the school in re-writing tests as 'significant' lacked an evident and intelligible justification.

39 Whilst the Commissioner acknowledged the appellant's challenge to the respondent's estimates,[38] he recognised that new tests must meet the 'Principles of Assessment from the Curriculum Framework'.[39] He accepted the school's submission that it is not open simply to adopt test questions in the public domain because of the requirements of the Curriculum Council. That finding was said to be supported by evidence from another highly experienced Head of Department from another senior school.

40 This ground is, in substance, merely an allegation that the Commissioner should have given more weight to the appellant's submission as to the cost of writing new test papers. That assertion is no more than a complaint that the Commissioner should have reached a different decision on the evidence before him. The ground does not identify any question of law, and should be dismissed.

Ground 5: The Commissioner included misleading evidence against the appellant's case in his decision

41 This ground is directed to the Commissioner's finding at [55] of his reasons where he said:

> 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 [s]chool already agrees to discuss academic issues with parents. This is illustrated by the meeting which the [s]chool held with the complainant's wife and science teacher. The [s]chool also offered to meet with the complainant.

42 The appellant acknowledges in his written submissions that the science department offered him a meeting. He alleges, however, that the offer was to meet with the appellant for 10 minutes to review test answers and was not a genuine offer to discuss academic issues.[40] The Commissioner's finding was 'that, where appropriate, the [s]chool already agrees to discuss academic issues with parents'.[41] The Commissioner

[38] ***Re H and Department of Education*** [2014] WAICmr 21 [31].
[39] ***Re H and Department of Education*** [2014] WAICmr 21 [32].
[40] Appellant's submissions [28] - [30].
[41] ***Re H and Department of Education*** [2014] WAICmr 21 [55].

merely used the meeting which the school held with the appellant's wife and the science teacher as an illustration of that approach.[42] It may well be that he treated the offer by the school to meet with the complainant as a further illustration. Even if the Commissioner erred in using the meeting with the appellant as an illustration of the school's preparedness to discuss academic issues with parents, which I do not consider he did, that would not amount to any error of law capable of supporting an appeal under s 85 of the Act.

Ground 6: The Commissioner included an irrelevant piece of evidence in its decision

43 Although it is not entirely clear, it appears that this ground asserts that the Commissioner took into account an irrelevant consideration by drawing upon the decision in ***Re Redfern*** which involved different factual circumstances. In oral submissions, the appellant clarified that he was concerned that the Commissioner had taken into consideration concerns about plagiarism which had no relevance to the present case.

44 The relevant passage of the Commissioner's reasons is as follows:

> 36. In ***Re Redfern [and] University of Canberra*** [1995] AATA 200 (***Re Redfern***), Deputy President McMahon considered analogous legislative provisions under the *Freedom of Information Act 1982* (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

[42] Appellant's submissions [28] - [30].

> 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.

45 It is quite apparent from the passage set out above that the Commissioner drew upon the conclusion from ***Re Redfern*** relating to the first aspect of prejudice identified in that case, being the undesirability of 'collateral disagreement'. In relation to plagiarism, the Commissioner's conclusion was not that any risk of plagiarism was present in this case. Rather, he simply identified a second concern, in addition to collateral disagreement, being the possibility that a student may be advantaged by access to previous tests. Although referred to in the same paragraph as reference to plagiarism in ***Re Redfern***, the advantage of which he spoke was not, in my view, that gained by plagiarism.

46 Ground 6 is without merit.

Conclusion

47 In his written submissions, the appellant raised many arguments as to the merits of his claim for access and reasons why he contends access should be granted. It is not necessary for me to deal with those matters because this appeal is only open on questions of law. The court has no jurisdiction to embark upon a review of the merits of the Commissioner's exercise of his discretion.

48 None of the grounds of appeal are made out, and the application should be dismissed.