

Notice of Decision and Reasons for Decision

Applicant:	'AP8'
Agency:	Victorian Curriculum and Assessment Authority
Decision Date:	16 October 2019
Exemptions considered:	Section 34(4)(c)
Citation:	'AP8' and Victorian Curriculum and Assessment Authority (<i>Freedom of Information</i>) [2019] VICmr 143 (16 October 2019)

FREEDOM OF INFORMATION – marking guide – writing component – exam – General Achievement Test (GAT) – Victorian Curriculum and Assessment Authority – secondary education

All references to legislation in this document are to the *Freedom of Information Act 1982* (Vic) (**FOI Act**) unless otherwise stated.

Notice of Decision

I have conducted a review under section 49F of the Agency's decision to refuse access to documents requested by the Applicant under the FOI Act.

My decision on the Applicant's request is the same as the Agency's decision in that I have decided the document is exempt in full.

The Schedule of Documents in **Annexure 1** sets out my decision in relation to the document.

My reasons for decision follow.

Sven Bluemmel
Information Commissioner

16 October 2019

Reasons for Decision

Background to review

1. The Applicant made a request to the Agency for access to the following documents:

Marking criteria for the writing component of the [General Achievement Test] (**GAT**) exam
2. In its decision, the Agency identified one document falling within the terms of the Applicant's request. It decided to refuse access to the document in full.
3. The Applicant operates an educational consultancy service for students, teachers and schools and outlined their belief that publication of the information would increase transparency in the educational system and improve student outcomes.
4. The GAT is undertaken by all Victorian students enrolled in one or more Victorian Certificate of Education (**VCE**) or scored VCE Vocational Education and Training (**VET**) sequences. It is designed to test general knowledge and writing numeracy and reasoning skills and students are not required to undertake special study to prepare for sitting the GAT.
5. GAT results do not count directly towards a student's VCE results. The GAT is used by the Agency to check that school-based and external assessments have been accurately assessed, to contribute to statistical moderation of school-based assessment results and to assist in the instance a student suffers from an illness, accident or trauma which may impact on their ability to complete other formal assessments.
6. The above information was drawn from the Agency's website, further information about the Agency's processes around the GAT can be found at vcaa.vic.edu.au/assessment/vce-assessment/general-achievement-test.

Review

7. The Applicant sought review by the Information Commissioner under section 49A(1) of the Agency's decision to refuse access.
8. I have examined a copy of the document subject to review.
9. The Applicant and the Agency were invited to make a written submission under section 49H(2) in relation to the review.
10. I have considered all communications and submissions received from the parties, including:
 - (a) the Agency's decision on the FOI request;
 - (b) information provided with the Applicant's review application on 27 May 2019;
 - (c) the Applicant's submission dated 10 June 2019; and
 - (d) the Agency's submissions dated 21 June 2019 and 3 September 2019.
11. In undertaking my review, I have had regard to the object of the FOI Act, which is to create a general right of access to information in the possession of the Government or other public bodies, limited only by exceptions and exemptions necessary to protect essential public interests, privacy and business affairs.

Review of exemptions

12. The Agency relied on the exemptions in sections 30(1) and 34(4)(c) to refuse access to the document. The Agency's decision letter sets out the reasons for its decision.

Section 34(4)(c)

13. Section 34(4)(c) provides a document is an exempt document under the FOI Act if:
- (a) it is an examination paper, a paper submitted by a student in the course of an examination, an examiner's report or similar document; and
 - (b) the use or uses for which the document was prepared have not been completed.
14. The Agency made the following submissions with respect to section 34(4)(c) in its first submission:
- Section 34(4)(c) of the FOI Act does not require any public interest considerations in order for a document to be exempt from release. A document will be an exempt document under section 34(4)(c) if (i) it falls within the class of described documents[;] and (ii) its use has not yet been completed.
 - It is the [Agency's] position that the GAT assessment criteria clearly falls within the class of described documents. While it is not an 'examiner's report', the assessment criteria is a document that an examiner's report is based upon and is closely associated, therefore can be described as a 'similar document.'
 - Section 34(4) recognises the uniquely confidential nature of examinations by acknowledging that exam-related documents that are still in use should not be disclosed to the public. The GAT assessment criteria document is used each year in the marking of GAT papers. Its use is therefore on-going.
15. In considering this matter, I have had regard for the decision made by the Victorian Civil and Administrative Tribunal (VCAT) in *McKean v University of Melbourne*¹ (the **McKean decision**) where Deputy President Dwyer stated:
- It was common ground before me that the marking guides were a "similar document" for the purpose of this provision. The dispute under this provision therefore related solely to whether the use or uses for which the document was prepared have been completed.²
16. This view was upheld by the Supreme Court in 2008.³

Is the marking guide a "similar document"?

17. I note that in the McKean decision it was accepted by the parties that the marking guides were a "similar document" in the requisite sense and the discussion focused on whether the use of the document had been completed. In the circumstances of this review, I am required to consider how the marking criteria for the written component of the GAT is a "similar document". There is limited commentary on what constitutes a "similar document" under section 34(4)(c).
18. I am of the view that the purpose of the exemption in section 34(4)(c) is to protect the efficacy of the testing and the integrity of the examination process. I am of the view that disclosure of documents like marking guides which are integral to the conduct of tests such as the GAT may prejudice the effectiveness of the testing. Accordingly, I am satisfied that a marking guide is a "similar document" to an examiner's report by virtue of the fact it plays a key role in ensuring the efficacy and

¹ [2007] VCAT 1310

² *McKean v University of Melbourne* [2007] VCAT 1310 at [22].

³ *University of Melbourne v McKean* [2008] VSC 325.

consistency of the testing process. Therefore, I accept that the document meets the first limb of the exemption under section 34(4)(c) in that it is classified as a 'similar document'.

Has the use of the document been completed?

19. I must now consider the second limb under section 34(4)(c) and determine whether use or uses for which the document was prepared have been completed.
20. As the document subject to this review is marked with the year 2018, my initial view was that the use for which the document was prepared had been completed. On this issue, I sought further clarification from the Agency which submitted:
 - In contrast [to the McKean decision], the GAT assessment criteria set out in the document were developed in 1995 for the purpose of assessing student GAT responses for the writing components of future GATs. As previously advised, the criteria have not substantially changed over the years. The stimulus material and the questions change each year, but the *nature* of the task and what assessors look for in discriminating between responses for the purpose of marking remain consistent. Indeed, the substance of the criteria has remained the same, with only minor changes, often only grammatical. The GAT assessment criteria set out in the document was used in 2018 and 2019 and is also intended to be used in 2020. The use for which the assessment criteria were prepared has not yet been completed and therefore meets the requirement of [section] 34(4)(c) of the FOI Act.
 - Justice Kyrour in the Supreme Court in [University of Melbourne v] *McKean* noted that it was open to the VCAT to find on the evidence before it that the documents the subject of the request had been prepared solely for use in the relevant examination. In contrast, the document which is the subject of this request was prepared for the ongoing use of assessments of future GATs, and will be used by the [Agency] again.
21. I also note media reporting from 9 September 2019⁴ that the GAT is being reformed in Victoria with students to sit a 'revamped' test from the year 2021.
22. Considering the Agency's further submission and this media reporting, I am satisfied that the document meets the second limb of the exemption in that it will be utilised to mark future GAT assessments at least until 2021, and the use for which the document was prepared has not been completed.
23. In light of my decision it is not necessary for me to consider the second exemption relied upon by the Agency.
24. I acknowledge that both the Applicant and Agency made detailed submissions around the exemption set out in section 30(1), specifically with respect to the public interest test. As per the McKean decision, unlike section 30(1) and the FOI legislation relevant to examination material in other jurisdictions, there is no public interest criterion under section 34(4)(c).⁵

Conclusion

25. I consider the document to be exempt in full under section 34(4)(c).

⁴ <https://www.theage.com.au/national/victoria/students-set-to-face-new-literacy-and-numeracy-tests-in-vce-revamp-20190909-p52pm2.html>

⁵ *McKean v University of Melbourne* [2007] VCAT 1310 at [26].

Review rights

26. If either party to this review is not satisfied with my decision, they are entitled to apply to the VCAT for it to be reviewed.⁶
27. The Applicant may apply to VCAT for a review up to 60 days from the date they are given this Notice of Decision.⁷
28. The Agency may apply to VCAT for a review up to 14 days from the date it is given this Notice of Decision.⁸
29. Information about how to apply to VCAT is available online at www.vcat.vic.gov.au. Alternatively, VCAT may be contacted by email at admin@vcat.vic.gov.au or by telephone on 1300 018 228.
30. The Agency is required to notify the Information Commissioner in writing as soon as practicable if either party applies to VCAT for a review of my decision.⁹

When this decision takes effect

31. My decision does not take effect until the relevant review period (stated above) expires. If a review application is made to VCAT, my decision will be subject to any VCAT determination.

⁶ The Applicant in section 50(1)(b) and the Agency in section 50(3D).

⁷ Section 52(5).

⁸ Section 52(9).

⁹ Sections 50(3F) and (3FA).

Annexure 1

Document No.	Date of Document	Document Description	Number of Pages	Agency's Decision	OVIC Decision	OVIC Comments
1.	Agency description: 'Unknown but current at time of application.'	General Achievement Test – Assessment Criteria Writing Tasks 1 and 2.	5	Refused in full Sections 30(1) & 34(4)(c)	Refuse in full Section 34(4)(c)	Section 34(4)(c): As per the body of the decision, I accept the document meets both limbs of the exemption set out in 34(4)(c).