



## Decision and Reasons for Decision

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<b>Citation:</b>	<i>Hodgetts and Department of State Development, Infrastructure, Local Government and Planning</i> [2022] QICmr 34 (30 June 2022)
<b>Application Number:</b>	316071
<b>Applicant:</b>	Hodgetts
<b>Respondent:</b>	Department of State Development, Infrastructure, Local Government and Planning
<b>Decision Date:</b>	30 June 2022
<b>Catchwords:</b>	ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST - request for documents regarding a proposed planning scheme amendment - accountability, informed debate and environmental risks - deliberative process - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the <i>Right to Information 2009 (Qld)</i>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of State Development, Infrastructure, Local Government and Planning (**Department**) under the *Right to Information Act 2009* (Qld) (**RTI Act**) for access to 'correspondence and enclosures between the Noosa Council and the Department (Planning unit) about the proposed planning scheme amendment dealing with Natural Hazards (Erosion)' (**Proposed Planning Scheme Amendment**).
2. The Department located 1155 pages as relevant to the application. After conducting consultation with relevant third parties, the Department decided to disclose 152 pages and refuse access to 916 pages and parts of 87 pages, on the basis that disclosure would, on balance, be contrary to the public interest.<sup>2</sup>
3. The applicant sought internal review of that decision<sup>3</sup> and, on internal review, the Department affirmed its original decision.<sup>4</sup>

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<sup>1</sup> By access application dated 31 January 2021. The application requested documents within the period 1 August 2020 to 31 January 2021.

<sup>2</sup> On my review of the documents, the Department disclosed 153 pages in full to the applicant and refused parts of 86 pages.

<sup>3</sup> By letter dated 30 March 2021, which also confirmed that the applicant did not seek internal review of the decision as it related to refused personal information. Accordingly, that refused personal information is not being considered in this review.

<sup>4</sup> Internal review decision dated 30 April 2021.

4. The applicant then applied to the Office of the Information Commissioner (**OIC**) for external review.<sup>5</sup>
5. On external review, 413 of the previously refused pages were disclosed to the applicant.
6. For the reasons set out below, I affirm the Department's decision and find that access to the remaining information in issue in this review may be refused on the ground that its disclosure would, on balance, be contrary to the public interest.

## Background

7. On 16 July 2020, Noosa Council (**Council**) resolved to adopt a new planning scheme for the Noosa Shire. That planning scheme came into effect on 31 July 2020 (**Noosa Plan 2020**).<sup>6</sup>
8. The approval of the Noosa Plan 2020 by the Minister for State Development, Manufacturing, Infrastructure and Planning included a condition for finalising '*Council's Coastal Hazards Adaptation Plan funded by the State Government and incorporate information into the scheme within 12 months of adopting the scheme*'.<sup>7</sup>
9. Council wrote to the Department on 29 July 2020 proposing a tailored process for the Proposed Planning Scheme Amendment, which noted that the Coastal Hazards Adaptation Plan (**CHAP**) required completion to '*directly inform the proposed amendment and erosion mapping*'.<sup>8</sup> Following community consultation, the CHAP was adopted by Council on 18 November 2021 and has been submitted to the Department of Environment and Science.<sup>9</sup>
10. The process for making the Proposed Planning Scheme Amendment was stipulated in a Chief Executive Notice (**Notice**)<sup>10</sup> issued in August 2020. Part C of the Notice identifies the steps to be taken, and the entities responsible for them, in seven separate stages—planning and preparation<sup>11</sup>; State interest review<sup>12</sup>; public consultation; considering submissions; changing the proposed amendment; Minister's consideration; and adoption.
11. The Department has confirmed that currently, the Proposed Planning Scheme Amendment process remains in its first stage, as the relevant amendment is still in the drafting phase.<sup>13</sup>

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<sup>5</sup> External review application dated 13 May 2021.

<sup>6</sup> Council adopted administrative amendments to the plan on 17 September 2020 and the current version of the Noosa Plan 2020 may be accessed via Council's website at: <<https://www.noosa.qld.gov.au/noosa-plan-2020>>

<sup>7</sup> Refer to <<https://www.noosa.qld.gov.au/noosa-plan-2020>>.

<sup>8</sup> Refer to <[https://www.statedevelopment.qld.gov.au/\\_\\_data/assets/pdf\\_file/0021/48621/released-documents-rti2021-040-dsdilgp.pdf](https://www.statedevelopment.qld.gov.au/__data/assets/pdf_file/0021/48621/released-documents-rti2021-040-dsdilgp.pdf)>. At page 7 of this document, Council describes the aim of the Proposed Planning Scheme Amendment as: '*to provide for the protection of coastal processes, landforms and vegetation within sensitive beachfront areas; avoid risk to public safety and damage to property; and ensure future development is located as far landward as is practicable, preferably outside the high risk coastal erosion areas. The intent is to mitigate the risks from coastal erosion to people, property and the environment to an acceptable or tolerable level*'.

<sup>9</sup> Information about the CHAP process (including the CHAP submitted for approval), can be found on Council's website at: <[<sup>10</sup> Dated 19 August 2020 and titled '\*Notice about the process for making or amending a planning scheme under section 18\(3\) of the Planning Act 2016 – Noosa Plan 2020 Amendment 1 - Coastal Erosion - Noosa Shire Council\*'. This notice can be accessed at: <<https://dsdmipprd.blob.core.windows.net/general/chief-executive-notice-noosa-shire-council-aug-2020.pdf>>.](https://www.noosa.qld.gov.au/coastal-hazards-adaptation-plan#:~:text=At%20its%20Ordinary%20Meeting%20on,requirements%20of%20the%20QCoast2100%20program.></a>>.</p></div><div data-bbox=)

<sup>11</sup> In this stage, Council is required to prepare a draft of the planning scheme amendment and consult with the relevant state agencies (including Queensland Treasury) while preparing that draft amendment.

<sup>12</sup> This process commences with Council giving a formal notice to the Chief Executive which includes the proposed amendment, following completion of consultation required in the previous stage.

<sup>13</sup> Email dated 8 April and 29 June 2022. This is also reflected on Council's website, which states 'There are currently no proposed amendments to Noosa Plan 2020' (refer to <<https://www.noosa.qld.gov.au/noosa-plan/draft-amendments-noosa-plan-1>>).

## Reviewable decision

12. The decision under review is the Department's internal review decision dated 30 April 2021.

## Evidence considered

13. Significant procedural steps taken during the external review process are set out in the Appendix. The evidence, submissions, legislation and other material I have considered in reaching this decision are disclosed in these reasons (including the footnotes and Appendix).
14. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>14</sup> I consider a decision-maker will be '*respecting and acting compatibly with*' that right and others prescribed in the HR Act, when applying the law prescribed in the RTI Act.<sup>15</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act.<sup>16</sup>

## Information and issue for determination

15. Following the disclosure of further information during this review, the remaining information to which the Department refused access appeared on 589 pages.<sup>17</sup> As the personal information to which the Department refused access in those pages is not in issue,<sup>18</sup> the information remaining for consideration appears on 563 pages<sup>19</sup> (**Information in Issue**).
16. In the internal review decision, the Department described this information as forming '*part of ongoing consultation between the Department and Council that is occurring as part of an intensive pre-lodgement process on a proposed planning scheme amendment to incorporate the state interest for natural hazards (erosion prone areas) - also commonly referred to as coastal hazards - into the Noosa Plan 2020 (the Planning Scheme)*'. The applicant contests that the Information in Issue formed part of such a pre-lodgement process and argues that it is information submitted '*as a part of, and in accordance with the statutory amendment process*'.<sup>20</sup> Noting the Department's confirmation that the amendment process remains in its first stage and that I am limited in the extent to which I can describe the Information in Issue,<sup>21</sup> I can confirm that it generally consists of emails and draft reports related to preliminary processes for the Proposed Planning Scheme Amendment.

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<sup>14</sup> Section 21 of the HR Act.

<sup>15</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

<sup>16</sup> I also note the following observations made by Bell J in *XYZ* at [573], on the interaction between equivalent pieces of Victorian legislation (namely, the *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)): '*it is perfectly compatible with the scope of that positive right in the Charter for it to be observed by reference to the scheme of, and principles in, the Freedom of Information Act*'.

<sup>17</sup> Comprising 503 full pages and parts of 86 pages. In my correspondence to the applicant, I incorrectly referred to this information appearing on 590 pages.

<sup>18</sup> As noted in footnote 3. In the Department's original decision (dated 26 March 2021), this personal information is the only refused information on 26 pages (numbered 282, 331, 587, 588, 591, 593, 596, 597, 606, 607, 612, 614, 618, 705, 708, 710, 714, 716, 721, 723, 733, 737, 739, 742, 745 and 747).

<sup>19</sup> Comprising 503 full pages and parts of 60 pages (numbered 3-5, 7-21, 23-32, 34-41, 43-45, 180-181, 183, 187, 199-201, 204, 206, 209-210, 212-219, 221-222, 224, 226-227, 230, 253-254, 272, 285-286, 298, 305-313, 315, 317, 319, 322-323, 325-326, 328-330, 333-524, 526, 528, 530, 600-604, 610, 616, 707, 713, 720, 726-727, 729-732, 736, 741, 743-744, 749, 836-1080, 1082, 1084, 1142, 1145-1147 and 1149-1155).

<sup>20</sup> External review application.

<sup>21</sup> Section 108(3) of the RTI Act, which relevantly prevents the Information Commissioner from revealing information claimed to be contrary to the public interest information.

17. The issue for determination is whether access to the Information in Issue may be refused on the basis its disclosure would, on balance, be contrary to the public interest.<sup>22</sup>

### Relevant law

18. Under the RTI Act, a person has a right to be given access to documents held by a Queensland government agency.<sup>23</sup> This right is, however, subject to limitations including grounds on which access to information may be refused.<sup>24</sup> One ground for refusing access is where disclosure would, on balance, be contrary to the public interest.<sup>25</sup>
19. The term *public interest* refers to considerations affecting the good order and functioning of the community and government affairs for the well-being of citizens. This means that in general, a public interest consideration is one which is common to all members of, or a substantial segment of, the community, as distinct from matters that concern purely private or personal interests.<sup>26</sup>
20. The RTI Act lists factors that may be relevant to deciding the balance of the public interest<sup>27</sup> and sets out the following steps that a decision-maker must take<sup>28</sup> in deciding where the public interest lies in relation to disclosure of information:
- identify any irrelevant factors and disregard them
  - identify relevant public interest factors favouring disclosure and nondisclosure
  - balance the relevant factors favouring disclosure and nondisclosure; and
  - decide whether disclosure of the information would, on balance, be contrary to the public interest.
21. Schedule 4 of the RTI Act contains a non-exhaustive list of factors that may be relevant in determining where the balance of the public interest lies in a particular case. I have carefully considered these factors, together with all other relevant information, in reaching my decision. Additionally, I have kept in mind the RTI Act's pro-disclosure bias<sup>29</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly.<sup>30</sup>

### Findings

22. I have not taken any irrelevant factors into account in making this decision.

### **Factors favouring disclosure**

23. Public interest factors favouring disclosure will arise under the RTI Act where disclosing information could reasonably be expected to:
- promote open discussion of public affairs and enhance the government's accountability<sup>31</sup>

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<sup>22</sup> Sections 47(3)(b) and 49 of the RTI Act.

<sup>23</sup> Section 23 of the RTI Act.

<sup>24</sup> The grounds of refusal are set out in section 47 of the RTI Act.

<sup>25</sup> Sections 47(3)(b) and 49 of the RTI Act

<sup>26</sup> However, there are some recognised public interest considerations that may apply for the benefit of an individual.

<sup>27</sup> Schedule 4 of the RTI Act sets out the factors for deciding whether disclosing information would, on balance, be contrary to the public interest. However, this list of factors is not exhaustive. In other words, factors that are not listed may also be relevant.

<sup>28</sup> Section 49(3) of the RTI Act.

<sup>29</sup> Section 44 of the RTI Act.

<sup>30</sup> Section 47(2) of the RTI Act.

<sup>31</sup> Schedule 4, part 2, item 1 of the RTI Act.

- contribute to positive and informed debate on important issues or matters of serious interest<sup>32</sup>
  - inform the community of the government's operations, including, in particular, the policies, guidelines and codes of conduct followed by government in its dealings with members of the community<sup>33</sup>
  - reveal the reason for a government decision and any background or contextual information that informed the decision;<sup>34</sup> and
  - contribute to the protection of the environment and reveal environmental or health risks.<sup>35</sup>
24. The impacts of inundation and coastal erosion in the Noosa community are serious issues for a variety of stakeholders—the Noosa Plan 2020 and the CHAP both recognise this—and I note that significant community discussion has occurred about coastal erosion plans and associated urban planning (evidenced most recently by the community engagement Council has undertaken in respect of the CHAP).
25. The applicant submitted that '[t]o allow the community to effectively comment and discuss with the Council the CHAP, ... the community should be permitted to see the draft scheme amendments and the supporting material on which these were based'.<sup>36</sup> However, as noted above, Council considered the recently adopted CHAP would *inform* its preparation of the proposed amendment (which is still occurring in the first phase of the stipulated process) and the formal 'State interest review' and public consultation phases are yet to commence.
26. I consider the publicly accessible information—including the Notice, the CHAP and the information available on Council's website about the Noosa Plan 2020—together with the information which has been disclosed to the applicant, have substantially advanced the government's accountability and transparency concerning the Proposed Planning Scheme Amendment. I also note that the Notice contemplates that a formal stage of public consultation will occur. I accept that disclosing the Information in Issue may allow some additional scrutiny of the actions taken, and information being considered, to date in respect of the Proposed Planning Scheme Amendment. However, taking into account the nature of the Information in Issue and that the amendment process remains in its first stage, I consider that disclosure of that would not further advance, in any significant way, the public interest factors relating to government accountability and transparency. On this basis, I afford these factors<sup>37</sup> moderate weight in favour of disclosure.
27. I note that the Information in Issue relates to a period prior to finalisation, and adoption of, the CHAP. The applicant acknowledged that the CHAP was '*determinant of the planning scheme amendments*'.<sup>38</sup> Further, as noted above, the Proposed Planning Scheme Amendment process is still in its 'planning and preparation' phase. In this context, I consider that disclosure of the Information in Issue may also, in a limited sense, reveal background information for a government decision and, accordingly, I afford this factor favouring disclosure<sup>39</sup> only low weight.
28. Similarly, I accept that the Information in Issue generally relates to the environmental issue of coastal erosion and its disclosure may, to some extent, reveal further information about environmental risks being considered in Council's drafting of the Proposed

<sup>32</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>33</sup> Schedule 4, part 2, item 3 of the RTI Act.

<sup>34</sup> Schedule 4, part 2, item 11 of the RTI Act.

<sup>35</sup> Schedule 4, part 2, items 13 and 14 of the RTI Act.

<sup>36</sup> External review application.

<sup>37</sup> Schedule 4, part 2, items 1, 2 and 3 of the RTI Act.

<sup>38</sup> External review application.

<sup>39</sup> Schedule 4, part 2, item 11 of the RT Act.

Planning Scheme Amendment. However, I again note that, while the CHAP has now been adopted by Council and made accessible on its website<sup>40</sup>, the Proposed Planning Scheme Amendment is still in its preparation phase. In these circumstances and taking into account the information disclosed to the applicant, I consider disclosing the Information Issue would, given its nature, not further contribute to the protection of the environment or reveal environmental risks in any significant way. Accordingly, I also afford these factors favouring disclosure low weight.<sup>41</sup>

29. Taking into account the particular nature of the Information in Issue, I cannot identify any other public interest considerations favouring its disclosure.<sup>42</sup>

### **Factors favouring nondisclosure**

30. A public interest factor favouring nondisclosure will arise where disclosing information could reasonably be expected to prejudice a deliberative processes of government.<sup>43</sup> The RTI Act also recognises that there is a public interest harm in disclosing an opinion, advice or recommendation that has been obtained, prepared or recorded in the course of or for the deliberative processes involved in the functions of government.<sup>44</sup> However, there are a number of exceptions to this harm factor, including where the deliberative processes include public consultation and that public consultation has commenced.<sup>45</sup>
31. The Information Commissioner has previously characterised a deliberative process involved in the functions of an agency to be the agency's *'thinking processes'*.<sup>46</sup> Deliberative process has also been considered as *'careful consideration with a view to decision'*.<sup>47</sup>
32. As noted above, the Information in Issue relates to preliminary processes undertaken for the Proposed Planning Scheme Amendment and the amendment process is still in its 'planning and preparation' phase. The three steps in that phase require Council to prepare a draft of the Proposed Planning Scheme Amendment and consult with relevant state agencies, including Queensland Treasury, *'while preparing'* that draft amendment. Even after the draft amendment is finalised by Council, the stipulated public consultation stage of the process is not scheduled to commence until after a formal state interest review stage is completed.
33. The applicant contended that the relevant deliberative process associated with the Proposed Planning Scheme Amendment was the now finalised process for completion of the CHAP.<sup>48</sup> However, on the information before me (including the Notice), the

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<sup>40</sup> Together with a significant amount of associated information.

<sup>41</sup> Schedule 4, part 2, items 13 and 14 of the RTI Act.

<sup>42</sup> Having carefully considered all factors listed in schedule 4, part 2 of the RTI Act, I cannot see how, for example, disclosing Information in Issue could, given its nature, ensure oversight of expenditure of public funds (schedule 4, part 2, item 4 of the RTI Act); allow or assist enquiry into, reveal or substantiate, agency or official conduct deficiencies (schedule 4, part 2, items 5 and 6 of the RTI Act); advance the fair treatment of individuals or entities in accordance with the law in their dealing with agencies (schedule 4, Part 2, Item 10 of the RTI Act); or contribute to the administration of justice (schedule 4, part 2, items 16 and 17 of the RTI Act). In the event that further relevant factors exist in favour of disclosure, I am satisfied that there is no evidence before me to suggest that any would carry sufficient weight to outweigh the significant weight that I have afforded to the public interest factors that favour the nondisclosure of the Information in Issue.

<sup>43</sup> Schedule 4, part 3, item 20 of the RTI Act.

<sup>44</sup> Schedule 4, part 4, section 4(1) of the RTI Act.

<sup>45</sup> Schedule 4, part 4, section 4(2) of the RTI Act. Given the nature of the Information in Issue, the other exceptions in schedule 4, part 4, sections 4(3) and 4(4) of the RTI Act do not apply.

<sup>46</sup> *Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (1993) 1 QAR 60 (*Eccleston*) at [28]-[30], citing with approval the definition given in *Re Waterford and Department of Treasury (No.2)* (1984) 5 ALD 588 at 606. While *Eccleston* concerns section 41(1)(a) of the repealed FOI Act, it remains relevant to the public interest test under section 49 of the RTI Act and provides useful analysis of the wording still used in schedule 4, part 4, section 4(1) of the RTI Act.

<sup>47</sup> *Ibid.*

<sup>48</sup> External review application.

processes relevant for progressing the CHAP and the Proposed Planning Scheme Amendment, while intrinsically linked, are nevertheless different processes.

34. Therefore, on the information before me, I am satisfied that the deliberative processes for the Proposed Planning Scheme Amendment are ongoing.
35. In this first phase of the formal amendment process, Council is still obtaining agency feedback and considering its options and policy positions to inform the drafting of the amendment. I consider disclosure of the Information in Issue in these circumstances could have a negative impact on these preliminary decision-making and consultation processes. Accordingly, taking into account the stipulated amendment process in the Notice, I am satisfied that disclosing the Information in Issue at the present time (and before the public consultation stage) will cause significant level of harm to those deliberative processes. For these reasons, I also consider that disclosure of the Information in Issue could reasonably be expected to significantly prejudice the ongoing deliberative processes for the Proposed Planning Scheme Amendment.
36. The applicant argued that Council had in fact already started consulting the community about the Proposed Planning Scheme Amendment '*outside the formal consultation required under the Planning Act*'.<sup>49</sup> I note that the material provided by the applicant in support of this argument, while primarily referring to the proposed timeline for consultation under the amendment process, also confirmed that there were, at that time, no available details of what Council proposed for the amendment. In terms of the exception to the harm factor, having carefully considered the applicant's submissions, I am not satisfied that any public consultation for the Proposed Planning Scheme Amendment has in fact commenced.

### ***Balancing the public interest***

37. I have taken into account that the RTI Act is to be administered with a pro-disclosure bias.<sup>50</sup> For the reasons set out above, I am satisfied that disclosure of the Information in Issue would significantly prejudice the ongoing deliberative processes associated with the Proposed Planning Scheme Amendment and would be likely to cause a significant public interest harm to the government's ability to conduct those deliberative processes.
38. On the other hand, I have afforded moderate weight to the factors favouring disclosure relating to the government's transparency and accountability. In addition, and for the reasons outlined above, I have identified additional factors which favour disclosure of the Information in Issue (including those relating to protection of the environment and revealing environmental risks and background information for a government decision). However, taking into account the nature of the Information in Issue, I have afforded these factors only low weight.
39. In the circumstances of this case, I am satisfied that, on balance, the public interest factors favouring nondisclosure outweigh the factors favouring disclosure. Accordingly, I find that disclosure of the Information in Issue would, on balance, be contrary to the public interest and access may be refused on this basis.<sup>51</sup>

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<sup>49</sup> Submissions dated 9 February 2022.

<sup>50</sup> Section 44 of the RTI Act.

<sup>51</sup> Sections 47(3)(b) and 49 of the RTI Act.

## **DECISION**

40. For the reasons set out above, I affirm<sup>52</sup> the Department's decision and find that access to the Information in Issue may be refused on the ground disclosure would, on balance, be contrary to the public interest under section 47(3)(b) of the RTI Act.

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**T Lake**  
**Acting Assistant Information Commissioner**  
**Date: 30 June 2022**

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<sup>52</sup> As a delegate of the Information Commissioner, under section 145 of the RTI Act.



## APPENDIX

### Significant procedural steps

Date	Event
13 May 2021	OIC received the external review application.
28 May 2021	OIC notified the applicant and the Department that the application for external review had been accepted and requested information from the Department.
31 May 2021	OIC received the requested information from the Department.
13 September 2021	OIC requested further information from the Department.
14 September 2021	OIC received the requested information from the Department.
12 October 2021	OIC requested, and received, information from Council about the status of the amendment process.
26 October 2021	OIC received, information from Council about the status of the amendment process and asked the Department to consider release of certain information.
28 October 2021	The Department agreed to disclose certain information to the applicant.
15 December 2021	OIC requested, and received, further information from Council about the status of the amendment process.
27 January 2022	OIC notified the applicant that Department had agreed to disclose certain further information.
7 February 2022	OIC conveyed a preliminary view to the applicant and invited the applicant to provided submissions. OIC asked the Department to release the further information it had agreed to disclose.
9 February 2022	OIC received the applicant's submissions (and supporting material).
14 February 2022	OIC responded to the applicant and received further submissions from the applicant, contesting the preliminary view.
17 March 2022	OIC conveyed a further preliminary view to the applicant and asked the applicant to confirm whether he sought a formal decision. The applicant confirmed he wished to proceed to a formal decision.
30 March 2022	OIC requested further information from the Department about the status of the amendment process.
8 April 2022	OIC received the requested information from the Department.