



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>H52 and Department of Environment and Science [2022] QICmr 55 (20 December 2022)</i></b>
<b>Application Number:</b>	<b>316695</b>
<b>Applicant:</b>	<b>H52</b>
<b>Respondent:</b>	<b>Department of Environment and Science</b>
<b>Decision Date:</b>	<b>20 December 2022</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - DOCUMENTS NONEXISTENT OR UNLOCATABLE - whether agency has conducted reasonable searches - whether access to further documents may be refused on the basis they are nonexistent or unlocatable - sections 47(3)(e) and 52(1) of the <i>Right to Information Act 2009</i> (Qld)</b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Environment and Science (**Department**) for access under the *Right to Information Act 2009* (Qld) (**RTI Act**) to all documents between 1 January 1985 and 21 December 2021 ‘regarding’ a letter that the Department’s Deputy Director-General (**DDG**) had written to the applicant on 28 July 2021 concerning the re-development of the Brickworks site at Newmarket in Brisbane.
2. The Department did not make a decision within the timeframe specified in the RTI Act.<sup>2</sup> It was therefore deemed to have refused access to the requested information under section 46 of the RTI Act. The applicant applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of the Department’s deemed refusal.
3. Early in the external review, the Department searched for and located 77 pages that it regarded as relevant to the access application. It agreed to release these pages to the applicant, except for a small amount of personal information (comprising mostly signatures and mobile phone numbers) the disclosure of which it claimed would, on

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<sup>1</sup> Access application received on 15 December 2021. The scope of the application was initially much wider. The Department issued the applicant with a notice under section 42 of the RTI Act indicating that it was considering refusing to deal with the application on the ground that to do so would substantially and unreasonably divert the Department’s resources. The applicant then revised the scope of the application to the terms outlined in paragraph 1 above, and the Department accepted the revised scope.

<sup>2</sup> The Department requested several extensions of time during the processing period, which the applicant granted. It requested a further extension of time on 26 April 2022 to enable it to undertake third party consultations, which the applicant did not accept.

<sup>3</sup> On 4 May 2022.

balance, be contrary to the public interest.<sup>4</sup> Upon receipt of this material,<sup>5</sup> the applicant raised a 'sufficiency of search' issue, contending that additional responsive documents existed in the Department's possession.

4. For the reasons explained below, I vary the Department's deemed refusal of access decision by finding that there are no reasonable grounds for believing that additional documents responding to the terms of the access application exist in the Department's possession or under its control.

## Background

5. In 2017, Brisbane City Council approved the re-zoning of a 4.6 hectare industrial site in Brisbane's inner north (known as the Newmarket Brickworks site) for residential use. In 2020, Council approved a development application for townhouses and units to be built on the site.
6. The applicant is a resident of the area who has concerns about the development, and the actions of the various government agencies involved in approving or monitoring the development. He and other residents have made a number of applications under the RTI Act seeking access to a wide range of documents concerning the development, including information about the history of the site and its status as contaminated land, as well as safety aspects of the development.

## Reviewable decision

7. The decision under review is the Department's deemed refusal of access decision.

## Evidence considered

8. Significant procedural steps relating to the external review are set out in the Appendix.
9. The evidence, submissions, legislation and other material I have considered in reaching my decision are set out in these reasons (including footnotes and the Appendix). I have taken account of the applicant's submissions to the extent that they are relevant to the issues for determination in this review.<sup>6</sup>
10. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**), particularly the right to seek and receive information.<sup>7</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 and the *Information Privacy Act 2009* (Qld).<sup>8</sup> I have acted in this way in making this decision, in accordance with section 58(1) of the HR Act. I also note the observations made by Bell J on the interaction between equivalent pieces of Victorian legislation:<sup>9</sup> '*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>10</sup>

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<sup>4</sup> During the review, OIC identified a document from a related external review that was considered to fall within the terms of the access application. The Department agreed to give the applicant access to that document.

<sup>5</sup> The documents were released to the applicant on 20 July 2022.

<sup>6</sup> Including the external review application and the submissions dated 15 August 2022, and 3, 5 and 28 October 2022.

<sup>7</sup> Section 21(2) of the HR Act.

<sup>8</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>9</sup> *Freedom of Information Act 1982* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

<sup>10</sup> *XYZ* at [573].

### Issue for determination

11. The applicant does not dispute the refusal of access by the Department to the small amount of personal information contained in the released documents.
12. The only issue for determination is whether there are reasonable grounds for believing that the Department holds additional documents that respond to the terms of the access application, and, if so, whether the Department has taken all reasonable steps to locate such documents.

### Relevant law

13. Under the RTI Act, access to documents may be refused where they are nonexistent or unlocatable. A document is nonexistent if there are reasonable grounds to be satisfied the document does not exist: section 52(1)(a) of the RTI Act. A document is unlocatable if it has been or should be in the agency's possession and all reasonable steps have been taken to find the document, but it cannot be found: section 52(1)(b) of the RTI Act.
14. To be satisfied that documents are nonexistent, a decision-maker must rely on their particular knowledge and experience and have regard to a number of key factors, including:<sup>11</sup>
  - the administrative arrangements of government
  - the agency's structure
  - the agency's functions and responsibilities
  - the agency's practices and procedures (including but not exclusive to its information management approach); and
  - other factors reasonably inferred from information supplied by the applicant including the nature and age of the requested document/s and the nature of the government activity to which the request relates.
15. If searches are relied on to justify a decision that the documents do not exist, all reasonable steps must be taken to locate the documents. What constitutes reasonable steps will vary from case to case as the search and enquiry process an agency will be required to undertake will depend on the particular circumstances.
16. To determine whether a document exists, but is unlocatable, OIC is required to consider:
  - whether there are reasonable grounds for the agency to be satisfied that the requested document has been or should be in the agency's possession; and
  - whether the agency has taken all reasonable steps to find the document.
17. Generally, the agency that made the decision under review has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant.<sup>12</sup> However, where an external review involves an applicant arguing that there are missing documents, the applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. It is important to note that suspicion and mere assertion will not satisfy this onus.

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<sup>11</sup> *Pryor and Logan City Council* (Unreported, Queensland Information Commissioner, 8 July 2010) at [19] which adopted the Information Commissioner's comments in *PDE and the University of Queensland* (Unreported, Queensland Information Commissioner, 9 February 2009).

<sup>12</sup> Section 87(1) of the RTI Act.

### **Applicant's submissions**

18. Following negotiations with the Department, the agreed scope of the access application was:

*All documents ... (excluding those previously released by RTI20-... [ie another individual's earlier access application<sup>13</sup>]) regarding The Deputy Director-General response to [the applicant] dated 28 July 2021 concerning the Old Newmarket Brickworks. described by the property addresses 81 and 117 Mina Pde, 34 Yarradale St.  
Time period. 1 January 1985 to 21 December 2021.*

19. In the attachment to his email to OIC of 15 August 2022, the applicant set out an 11 page schedule in which he extracted various statements from the DDG's letter and identified documents that had not been provided to him by the Department but which he contended it was reasonable to assume existed, and that the Department must have relied upon in making the statements contained in the DDG's letter. The applicant's contentions were based upon the actions that he considered it was reasonable to expect that the Department should have taken. For example, the DDG's letter contains a statement as follows:

*The department has reviewed the development approval as approved by the Council and can confirm that a condition relating to contaminated land has been imposed and has been repeated throughout all stages of the development. This condition means that a suitably qualified person must be engaged to undertake all investigation and remediation works at the site and provide a summary of all works undertaken in a contaminated land investigation report.*

20. The applicant submitted as follows in respect of this statement:

*In July 2021 the site works had been underway for approximately 5 months:*

- 1) *Expect that DES officers would have informed DDG that works had been ongoing for 4 months (DES would have known this by web search of the address, Nearmap photos routinely used by DES or a site visit.)*
- 2) *As regulator DES would have knowledge and been fully informed of the sites prior condition by way of scientific reports and associated recommendations for its use.*
- 3) *Any differences between the information DES/Owner had not contained on the EMR.*
- 4) *As regulator had the previous and current DES known site conditions been changed by the works.*
- 5) *The regulator at this time would know who the nominated suitably qualified person was.*
- 6) *The investigation and mediation work at the site and*
- 7) *Contaminated land investigation report would have been asked for and in the possession of DES – It is key information.*

*Documents Item 3 – 1 to 7 have not been observed in the documents released to date.*

21. In respect of another statement contained in the DDG's letter concerning the responsibilities of the Department as opposed to the responsibilities of Brisbane City Council, the applicant submitted:

*The documents at Page 6 & 7 show that the DDG was well aware that the issue related to the use of public records. It was a major risk given it impacted DES as regulator. If they exist but DES does not have them then how do they regulate or how can DES verify information they publish is correct. DES's role as regulator may be compromised but DDG would be expected to know and manage these risks by seeking advice.*

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<sup>13</sup> This individual being another resident of the area who also has concerns about the development.

The DDG would document his request to departmental officers for advice regarding at least three key points:

- 1) Does the regulator DES they have all the public documents?
- 2) If not, who has them and?
- 3) How does the regulator get informed so it can regulate?

[My] document went to the Minister:

- 4) Where is the MECS document records showing the officers responsible, identification and traceability of the information between the Ministers Office and DES.

Documents Item 1 – 1 to 4 have not been observed in the documents released to date.

22. In my letter to the applicant in response,<sup>14</sup> I stated that I had formed the preliminary view that his submission was unreasonably speculative and oppressive in nature because:

- it did not describe the documents that he sought with sufficient certainty to allow the Department to identify them
- it asked questions of the Department, which was not permitted under the RTI Act
- it speculated about the actions that the applicant considered it was reasonable for the Department to have undertaken in preparing the DDG's response
- even if the documents existed, I was not satisfied that the terms of the access application could reasonably be interpreted as covering the breadth of highly detailed, source documentation that the applicant described; and
- even if the terms of the access application did cover such documents, the Department would have been entitled to refuse to deal with the application under section 41 of the RTI Act on the ground that to do so would substantially and unreasonably divert the resources of the Department in the performance of its functions.

23. The applicant lodged a further submission on 3 October 2022.<sup>15</sup> The thrust of his submission was that he sought access to '*public records about inconsistencies in public records*'. He asserted that the DDG's letter evidenced a change in the Department's previously-held position concerning the status of the Brickworks site and it was reasonable to expect that the Department would have '*substantial evidence documented*' concerning the change:

*The applicant simply wants to identify the information contained in the DES held documents or obtained for the DDG to respond. The variance in the DES position before and after 28 July 2021 is sufficient to conclude that a science-based organisation would have some basis of fact by way of a document to substantiate the change.*

24. Amongst other attachments, the applicant provided another version of his original schedule in which he again extracted statements from the DDG's letter; summarised his understanding of the Department's position on the relevant issue prior to the letter; and discussed the responsive documents that he stated he had a genuine belief existed. However, again, he sought to ask questions of the Department, or speculated about what he considered should have occurred. For example, the following statement is contained in the DDG's letter:

*At any stage of the development if something happens involving a hazardous contaminant or if there is a change in the condition of the land likely to or having caused serious or material*

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<sup>14</sup> Dated 30 August 2022.

<sup>15</sup> The attachment to the submission was provided on 5 October 2022.

*environmental harm, the relevant person must provide the department with written notice of the nature and the circumstances in which it happened within 24 hours after becoming aware of the event.*

25. In respect of this statement, the applicant submitted:

*In July 2021, the regulator DES and DDG had approx. 6 months to identify the change in the condition of the land as shown in Appendix 1.*

*DES had the 1998 Dames and Moore contaminant information.*

*...What documents did the DDG use when determining whether environmental harm was occurring and ... What documents did the DDG use to verify compliance with this requirement*

26. Another statement contained in the DDG's letter is as follows:

*The contaminated land investigation report is then submitted to an independent contaminated land auditor, who will review all works and determine what land use the site is suitable for, before submitting a site suitability statement to the department. The site can only be removed from the EMR if the contaminated land auditor determines the site is suitable for any land use and subsequently should be removed from the EMR.*

27. The applicant submitted as follows:

*Discussions in November 2021 concerning RTI...<sup>16</sup> with DES Sherman/Thomas and [the applicant and another resident] DES confirmed the DES current position had not changed in that DES had insufficient contamination data for 117 Mina Parade and the adjoining 34 Yarradale St properties.*

*Knowing that DES did not know the extent of contamination since 1998 the DDG would have asked for ... all of the DES required DDG referenced reports used in the DDG response.*

28. I responded to the applicant's submission on 12 October 2022. I advised him that I considered that his submission remained unreasonably speculative and oppressive in nature. He continued to speculate about what actions the Department should reasonably have taken in preparing the DDG's response. He also continued to ask questions of the Department with a view to requiring the Department to identify source documents that he contended the Department should have referred to when preparing the DDG's letter, rather than offering a sufficiently precise description to permit the Department, as a practical matter, to locate the documents sought.

29. I concluded that it remained my preliminary view that a reasonable interpretation of the scope of his access application was that it covered the documents relied upon in preparing the DDG's response, and that '[e]ven if your contention that the Department held a different position about relevant issues prior to July 2021 is correct, I do not accept that the scope of your application covers what you refer to as 'public records about inconsistencies in public records'.'

30. The applicant provided a final submission dated 28 October 2022. He referred to documents that had been released by the Department in response to another resident's earlier access application shortly after the DDG's letter had been issued. These documents were the documents expressly excluded from the agreed scope of the

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<sup>16</sup> Ie the previous access application (made by another local resident who also has concerns about the development) which the applicant excluded from the scope of his access application – see paragraph 18 above.

applicant's access application by the words '(excluding those previously released by RTI20-...)'<sup>17</sup>.

31. The earlier application by the other resident had sought access to contaminated land documents concerning the Brickworks site that had been submitted to or issued by the Minister/Department, or created internally by the Department between 1 January 1985 to 31 December 2014 and 31 December 2020 to 21 April 2021. The applicant contended that officers who were involved in identifying the documents responsive to RTI20-... were also involved in preparing the DDG's letter and therefore had both sets of records before them. To the best of my understanding, the applicant is of the view that documents responsive to RTI20-... were used in preparing the DDG's letter, and therefore are responsive to his access application (despite being expressly excluded from the agreed scope); whereas the documents identified by the Department as responsive to his application were not relied upon when preparing the DDG's letter, and therefore should not have been located in response to his application. In this regard, I have carefully considered the applicant's following submissions:

*Conclusion 1 – The issue for OIC is not about whether the documents exist - the regulator DES had the documents/records at the time – the records exist with the same DES DDG staff releasing the documents to the public at the same time the DDG letter was released.*

*Conclusion 2 – The facts show what DES documents the specific officers had yet DES have also made matters worse by providing documents they represent as having been used but obviously could not have used – Documents not in the RTI request and obviously so given the dates.*

*Conclusion 3 – OIC cannot place themselves in the DES office where the drafting and final decision was made. Whatever decision they make must be reliant upon some level of acceptance and scrutiny of DES representations made to OIC. (The OIC external review decision must objectively identify the documents used, reject the documents DES represent they did use but did not and stipulate where OIC rely upon the representations received from DES.*

*Conclusion 4 – The Applicant considers that OIC have an obligation to limit the reliance it places on DES statements. To do this OIC must ask and document in its External Review decision placed on the public record the DES response to the following key questions:*

- *Did DES use any of the documents in 20-345 in its decision? and if so what 20-345 documents were they?*
- *Will DES identify the documents that they released under instruction from OIC which were not part of the RTI?*

...

*It is simply the obligation of OIC in the external review decision to:*

- *identify the DES records/documents used*
- *identify the DES records/documents which DES represent were used but by the external review show they could not have been.*
- *Where DES are unable to identify the known DES records/documents used (from the totality of documents known to having been held by the two DES at the same time) the OIC clearly communicate any reliance it places on representations made to OIC by DES as to what documents were used.*

## **Discussion**

32. Contrary to the applicant's assertions, and, in particular, his concluding comments in the preceding paragraph, it is not OIC's role or obligation to identify the documents that the Department relied upon in preparing the DDG's letter, nor to identify the documents that

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<sup>17</sup> See agreed scope at paragraph 18 above.

could not have been relied upon by the Department. The Department has identified what it regards as responsive documents. The applicant contends there should be more documents, thereby raising a 'sufficiency of search' issue for OIC to consider. When considering a sufficiency of search issue under the RTI Act, the only questions for OIC to consider are:

- whether there are reasonable grounds for believing that additional responsive documents exist in the Department's possession or under its control; and, if so
- whether the searches and inquiries that the Department has conducted in an effort to locate such documents have been reasonable in all the circumstances.

33. The applicant has a practical onus to establish reasonable grounds to be satisfied that the agency has not discharged its obligation to locate all relevant documents. As noted above, suspicion and mere assertion will not satisfy this onus.
34. During the external review, the Department located and released 77 pages to the applicant. As regards the applicant's complaint that one of those documents<sup>18</sup> does not fall within the terms of his access application because it post-dates the DDG's letter, the only practical effect of such a release is that the Department is to be regarded as having given administrative access to this document, rather than access under the RTI Act.<sup>19</sup> An agency is free to give administrative access to any documents in its possession if it so chooses and an applicant suffers no prejudice through release in this form.<sup>20</sup> However, the applicant appears to contend that, in giving access to this document in response to the terms of the access application, the Department has falsely represented that it relied upon the document in preparing the DDG's letter. I consider it is more likely that the Department simply failed to alert itself to the date of the document when giving access. But in any event, access has been given and it not OIC's role under the RTI Act to enquire into the Department's intentions or motives in giving access.
35. For the reasons explained to the applicant in the preliminary view letters I issued during the review, I am not satisfied that he has discharged the onus upon him to establish reasonable grounds for believing that the agency has not complied with its obligation to locate all responsive documents. It is clear that the applicant holds strong views about what actions he considers the Department should have undertaken in preparing the DDG's letter, and what documents it should have created, reviewed or had regard to. However, in considering sufficiency of search issues, OIC often finds that the documents that an applicant *expects* should have been created, do not necessarily equate with what a government agency *actually* creates (or is required to create), in practice. Submissions in which an applicant speculates about the steps an agency *should* have taken in dealing with a matter and speculates about what documents *should* therefore exist do not ordinarily give rise to reasonable grounds for requiring an agency to conduct further searches for responsive documents.
36. As I have noted, I regard the applicant's various submissions about missing documents to be both speculative and unreasonable in their terms, and oppressive in form. I do not accept that a reasonable interpretation of the terms of his access application – *all documents regarding the DDG's response* – would cover the breadth of highly detailed source documentation that the applicant contends should have been created across many years, that he apparently seeks to have the Department identify for him by asking

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<sup>18</sup> Page 36 of 77 pages.

<sup>19</sup> Under the RTI Act, an agency is only obliged to deal with documents that fall within the terms of the access application.

<sup>20</sup> The only disadvantage for an applicant arises if an agency gives only partial administrative access to a document. If the applicant wishes to pursue access to the information that has been withheld, they will be required to make a fresh application to the agency seeking access to that information. If the agency again refuses access, the applicant will then have review rights under the RTI Act.



a series of questions in connection with statements contained in the DDG's letter. I am not satisfied that the applicant has offered a sufficiently precise description of what he contends are missing responsive documents to permit the Department, as a practical matter, to locate the documents sought.

37. The Department has not made any 'representations' to OIC about what documents it relied upon in preparing the DDG's letter, beyond providing OIC with copies of documents that were located after conducting searches of the Department's records and that were subsequently released by the Department to the applicant. As I advised the applicant during the course of the review, I have reviewed those documents and I consider that they support a finding that the DDG's letter was primarily informed by the 'points of relevance' summary contained at pages 57-58 of the released information (and various duplicates). I noted to the applicant that the email dated 23 July 2021 at page 69 (and duplicates) requests that the relevant officer prepare the response for the DDG and *'to include the facts about EMR, DA conditions about CLA, etc (from the attached dot points will be fine)*'. [my emphasis]
38. Further, to the extent that the applicant's final submission dated 28 October 2022 contends that officers involved in identifying the documents responsive to RTI20-... (the earlier access application by another resident) were involved in preparing the DDG's letter and therefore had both sets of records before them and, accordingly, documents responsive to RTI20-... were relied upon when preparing the DDG's letter, I again observe that this submission is speculative and that it disregards the course of events evident on the face of the released information noted in the preceding paragraph. I also note that, even if the applicant's submissions in this regard were correct, the agreed scope of his application expressly excludes documents released in response to this earlier access application by another resident.
39. In summary, there is nothing before me to establish reasonable grounds for believing that, in preparing the DDG's letter, material beyond the documents released to the applicant was relied upon. The applicant has attempted to assert otherwise by seeking to ask questions of the Department and speculating about what steps he considers the Department should reasonably have undertaken in preparing the response. However, mere assertion is not sufficient to discharge the onus upon him. Furthermore, as identified in paragraph 37, the released documents do not support such an assertion.
40. Given my views above, it is not strictly necessary for me to do so, however, I would also take the opportunity to note (and as explained to the applicant in my letter dated 30 August 2022) that, even if it could be established that the Department had referred to the broad range of detailed source documents contended for by the applicant such that they could be regarded as falling within the terms of the access application, I consider it is likely that the Department would have been entitled to refuse to deal with the application under section 41 of the RTI Act on the grounds that to do so would substantially and unreasonably divert the resources of the Department in the performance of its functions. Given the volume of potentially responsive documents identified by the applicant in the attachments to his submissions, I consider that the work involved in the Department conducting searches for and assessing located documents would likely be unreasonable in the circumstances and unable to be carried out within the statutory timeframe.

## Finding

41. For the reasons explained above, I am not satisfied on the material before me that the applicant has discharged the practical onus upon him to establish reasonable grounds for believing that the Department holds additional documents that respond to the terms of the access application.

## **DECISION**

42. I vary the decision under review by finding that there are no reasonable grounds for believing that additional documents responding to the terms of the access application exist in the Department's possession or under its control.
43. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**A Rickard**  
**Acting Right to Information Commissioner**

**Date: 20 December 2022**

**APPENDIX****Significant procedural steps**

<b>Date</b>	<b>Event</b>
4 May 2022	OIC received the application for external review. OIC requested preliminary information from the Department.
12 May 2022	OIC received the preliminary information from the Department.
3 June 2022	OIC advised the applicant and Department that the application for external review had been accepted.
17 June 2022	OIC received copies of the information in issue from the Department.
28 June 2022	The Department advised OIC that it did not object to disclosure of the information in issue with the exception of some personal information.
20 July 2022	The Department released the information in issue to the applicant.
15 August 2022	The applicant provided a submission.
30 August 2022	OIC conveyed a preliminary view to the applicant.
3 & 5 October 2022	The applicant provided a submission.
12 October 2022	OIC conveyed a further preliminary view to the applicant.
28 October 2022	The applicant provided a submission.
1 November 2022	OIC advised the Department that the matter would proceed to a formal decision.