



## Decision and Reasons for Decision

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**Citation:** *W74 and Department of Justice and Attorney-General [2019] QICmr 36 (3 September 2019)*

**Application Number:** 314056

**Applicant:** W74

**Respondent:** Department of Justice and Attorney-General

**Decision Date:** 3 September 2019

**Catchwords:** ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL OF ACCESS - CONTRARY TO PUBLIC INTEREST INFORMATION - information about the outcome of Office of Fair Trading investigation - whether disclosure would, on balance, be contrary to the public interest - sections 47(3)(b) and 49 of the *Right to Information Act 2009 (Qld)*

ADMINISTRATIVE LAW - RIGHT TO INFORMATION - IRRELEVANT INFORMATION - information irrelevant to terms of information access application - deletion of irrelevant information - section 73(2) of the *Right to Information Act 2009 (Qld)*

### REASONS FOR DECISION

#### Summary

1. The applicant applied<sup>1</sup> to the Department of Justice and Attorney-General (**Department**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to:
  - (1) 'All documents and recordings of an investigation and compliance action of my complaint to the Office of Fair Trading ... against... [a third party businessperson]' for the period January 2014 to December 2017, and
  - (2) 'A simple list of any other complaints to the Office of Fair Trading and/or compliance actions against [the third party]', for the period January 2009 to December 2017.
2. The Department located 148 pages. It decided<sup>2</sup> to release 110 in full, 6 in part, and refused access to 32, on the grounds disclosure of relevant information would, on balance, be contrary to the public interest,<sup>3</sup> or that access to certain pages was otherwise available.<sup>4</sup>

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<sup>1</sup> Application dated 18 January 2018.

<sup>2</sup> Internal review decision dated 23 April 2018.

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

<sup>4</sup> Section 47(3)(f) and section 53 of the RTI Act.

3. The applicant applied to the Office of the Information Commissioner (**OIC**) for external review of the Department's decision. Consultation with the third party was undertaken, and the Department agreed to release additional information to the applicant during the course of the review, reducing the information in issue to that specified in paragraph 9 below.
4. The review was then suspended for a period of several months at the applicant's request,<sup>5</sup> while he pursued proceedings in the Queensland Civil and Administrative Tribunal.
5. For the reasons explained below, I vary the Department's decision to refuse access to the information in issue. Some parts of this information are irrelevant to the terms of the applicant's access application, and may therefore be deleted, while disclosure of any of the information in issue would, on balance, be contrary to the public interest.

### **Background**

6. Significant procedural steps taken during the external review are set out in the Appendix to this decision.

### **Reviewable decision**

7. The decision under review is the Department's internal review decision dated 23 April 2018.

### **Evidence considered**

8. Evidence, submissions, legislation and other material considered in reaching this decision are referred to in these reasons (including footnotes and Appendix).

### **Information in issue**

9. The information in issue comprises eight full pages<sup>6</sup> and parts of a further 19 pages.<sup>7</sup> The information generally consists of the third party's and other individuals' personal particulars, licensing information, some historical trading and compliance information, and a small amount of information communicated by the third party to the Office of the Fair Trading<sup>8</sup> (**OFT**) in responding to the applicant's complaint.

### **Issues for determination**

10. The Department decided to refuse access to 20 pages, on the grounds they could be accessed via the public databases of information maintained by the Australian Securities and Investment Commission (**ASIC**).
11. The Department agreed to release one of these pages in its entirety during the course of the review, and it is not in issue.

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<sup>5</sup> From 18 February 2019 to 25 July 2019 (request dated 16 February 2019).

<sup>6</sup> Pages 6-7, 9, 22, 24, 142, 145-146.

<sup>7</sup> 1, 3-5, 8, 14-15, 19-21, 23, 26, 75, 78-79, 81, 141, 143-144. Copies of these and the pages identified in footnote 6, marked so as to indicate information in issue the subject of this decision, will accompany the copy of these reasons forwarded to the Department.

<sup>8</sup> A Departmental business unit: <https://www.justice.qld.gov.au/about-us/services/fair-trading/structure>.

12. As for the remaining 19, OFT confirmed with OIC during the review<sup>9</sup> that relevant pages are not, in fact, documents to which other access is available, but consist of information derived from OFT's internal case management systems. In these circumstances, it does not appear it was open to the Department to have refused access under section 47(3)(f) and section 53 of the RTI Act.
13. In any event, the Department agreed to release parts of many of these pages to the applicant during the review, while I formed the preliminary view that other information appearing on these pages could be deleted as irrelevant, and/or that it comprised information to which access could be refused under section 47(3)(b) of the RTI Act, as information disclosure of which would, on balance, be contrary to the public interest.
14. The applicant has not accepted that preliminary view. The principal issues for determination, then, are whether:
  - some information in issue can be deleted under section 73(2) of the RTI Act, on the grounds it is irrelevant to the access application; and
  - access can be refused to the information in issue under section 47(3)(b) of the RTI Act, on the grounds disclosure of that information would, on balance, be contrary to the public interest.<sup>10</sup>

### Irrelevant information

15. Section 73 of the RTI Act relevantly provides:

#### **73 Deletion of irrelevant information**

(1) *This section applies if giving access to a document will disclose to the applicant information the agency or Minister reasonably considers is not relevant to the access application for the document.*

(2) *The agency or Minister may delete the irrelevant information from a copy of the document and give access to the document by giving access to a copy of the document with the irrelevant information deleted.*

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16. Some of the information in issue on the following pages falls outside the date ranges stated in the applicant's access application, and/or does not bear upon nor is pertinent to<sup>11</sup> the '*investigation and compliance action in relation to [his] complaint*' or '*any other complaints or compliance actions*':
  - pages 1, 3-5, 15, 19-21, 79, 81, 141, 143-144;<sup>12</sup> and
  - pages 6, 22 and 142.<sup>13</sup>

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<sup>9</sup> On 13 August 2019.

<sup>10</sup> In his application for external review, the applicant also questioned the adequacy of the Department's searches for relevant information concerning Part 2 of his access application, ie information concerning '*any other complaints...and/or compliance actions against...*' the third party. The Department identified and dealt with information of this kind, which I have discussed as necessary through the course of these reasons. No reviewable issue arises in this regard.

<sup>11</sup> Paraphrasing the dictionary definition of 'relevant': Macquarie Dictionary Online [www.macquariedictionary.com.au](http://www.macquariedictionary.com.au) (accessed 26 August 2019).

<sup>12</sup> All redacted information.

<sup>13</sup> First two rows of substantive information (on the basis these fall outside the date range stated in Part 2 of the applicant's access application concerning '*other complaints...and/or compliance actions...*', and adopting a relatively broad interpretation of this part).

17. As a matter of fact, this information<sup>14</sup> is not relevant to the access application, and may therefore be deleted under section 73(2) of the RTI Act.

### **Contrary to public interest information**

18. The RTI Act gives people a right to access documents of government agencies such as the Department.<sup>15</sup> This right is subject to other provisions of the RTI Act, including grounds on which access may be refused. Access may be refused to information the disclosure of which would, on balance, be contrary to the public interest.<sup>16</sup>
19. The RTI Act lists factors which may be relevant to deciding the balance of the public interest<sup>17</sup> and sets out the following steps for deciding the balance of the public interest:<sup>18</sup>
- identify factors irrelevant to the public interest and disregard them
  - identify factors in favour of disclosure of information
  - identify factors in favour of nondisclosure of information; and
  - decide whether, on balance, disclosure of the information would be contrary to the public interest.
20. I am satisfied that disclosure of any<sup>19</sup> of the information in issue would, on balance, be contrary to the public interest. In reaching this decision, I have followed the above steps, and, in doing so, have taken no irrelevant factors into account. I have also kept in mind the RTI Act's pro-disclosure bias<sup>20</sup> and Parliament's requirement that grounds for refusing access to information be interpreted narrowly,<sup>21</sup> and have carefully considered the factors for deciding the public interest set out in schedule 4 to the RTI Act, and the applicant's submissions in this review.

### **Factors favouring disclosure**

21. Apart from the general public interest in furthering access to government-held information, I can identify no public interest considerations favouring disclosure of most of the information in issue. It sheds no light on the manner in which OFT dealt with the applicant's complaint, or the reasons for its decision in relation to that complaint, and its disclosure could not reasonably be expected to advance any of the public interest considerations itemised in schedule 4, part 2 of the RTI Act.
22. I do, however, accept that disclosure of information redacted from pages 14, 26, 75 and 78 could reasonably be expected<sup>22</sup> to disclose background or contextual information informing OFT's decision on the applicant's complaint.<sup>23</sup> This, together with the general public interest noted above, operates to favour disclosure of these specific segments of

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<sup>14</sup> Which is comprised of information such as the third party's residential address, and what I understand to be historical business and trading particulars (including past connections, with whom I do not understand the applicant to have had any dealings).

<sup>15</sup> Section 23 of the RTI Act.

<sup>16</sup> Section 47(3)(b) and section 49 of the RTI Act. 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, although there are some recognised public interest considerations that may apply for the benefit of an individual: Chris Wheeler, 'The Public Interest: We Know It's Important, But Do We Know What It Means' (2006) 48 *AIAL Forum* 12, 14.

<sup>17</sup> Schedule 4, these lists being non-exhaustive.

<sup>18</sup> Section 49(3) of the RTI Act.

<sup>19</sup> Including, for the sake of completeness, any that I have found may be deleted on the grounds of irrelevance.

<sup>20</sup> Section 44 of the RTI Act.

<sup>21</sup> Section 47(2)(a) of the RTI Act.

<sup>22</sup> The phrase 'could reasonably be expected to' calls for a decision-maker to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (eg merely speculative/conjectural 'expectations') and expectations which are reasonably based, ie, expectations for the occurrence of which real and substantial grounds exist: *B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 at [155] to [160].

<sup>23</sup> Schedule 4, part 2, item 11 of the RTI Act.

information. The applicant has, however, had released to him a considerable amount of contextual/background information – including surrounding information on these pages – serving to explain the basis of OFT’s decision. In the circumstances, I afford this factor moderate weight.

23. Separately, I also acknowledge that disclosure of some of the information in issue appearing on pages 8-9, 23-24 and 145-146 – information relevant to Part 2 of the access application<sup>24</sup> – may give some insight into how OFT discharges its regulatory duties,<sup>25</sup> and help to foster informed markets to a limited degree.<sup>26</sup> While these are not unimportant public interest considerations, they would, as discussed further below, come at the expense of important public interests telling against disclosure of this specific information. Given this, and the fact release of this information would not directly aid the applicant in understanding how his complaint was dealt with, I afford these considerations modest weight.

### **Applicant’s submissions**

24. The applicant argues that additional considerations operate to favour disclosure of the information in issue, beyond those identified above.
25. Firstly, in correspondence dated 20 January 2019, he made extensive submissions setting out what he contends is evidence of forgery in certain documents.
26. As I pointed out to the applicant in my letter dated 14 February 2019, while it is the case that a factor favouring disclosure of information will arise where disclosure of information could reasonably be expected to contribute to the enforcement of the criminal law,<sup>27</sup> to the extent any such information might arguably exist, it has already been disclosed to the applicant: ie, the very pages upon which he based his forgery contentions. Disclosure of the information now in issue would not advance this public interest consideration: it has no bearing on the issues raised in his submissions as to alleged forgery, and I cannot see that it furthers those allegations in any way.
27. In the same submissions, the applicant argued that, as regards information requested in Part 2 of his access application:<sup>28</sup>

*The inclusion of complaints that have been made against the Trader (that have been substantiated by the OFT) must also be released, as the Judge will take into account substantiated complaints history when deciding on punishment, i.e. whether the Trader is a habitual offender.*

28. Administration of justice considerations<sup>29</sup> will arise for contemplation in balancing the public interest where disclosure of information would assist in the pursuit of a legal remedy, or to evaluate whether a remedy is available or worth pursuing.<sup>30</sup> I cannot, however, see how disclosure to the applicant of information concerning complaints unrelated to him or any claim he has brought or may intend to bring against the third party would further either of these ends.<sup>31</sup>

<sup>24</sup> The Department released information appearing to confirm the existence of information relevant to Part 2 of the applicant’s access application, pursuant to its initial decision - a matter raised in the applicant’s application for external review.

<sup>25</sup> Thereby ensuring accountability and enhancing its transparency: public interest considerations generally embodied in schedule 4, part 2, items 1 and 3 of the RTI Act.

<sup>26</sup> A public interest consideration that may favour disclosure of information: *Channel Seven and Redland City Council* (Unreported, Queensland Information Commissioner, 30 June 2011), at [35].

<sup>27</sup> Schedule 4, part 2, item 18 of the RTI Act.

<sup>28</sup> Ie, information requested in the second part of his access application.

<sup>29</sup> Schedule 4, part 2, items 10, 16 and 17 of the RTI Act.

<sup>30</sup> *Willsford and Brisbane City Council* (1996) 3 QAR 368.

<sup>31</sup> Schedule 4, part 2, items 10, 16 and 17 of the RTI Act.

29. 'Any other' substantiated complaint information would not, as noted, concern him, and it is not apparent to me that even if any claim brought by him did prove successful – a matter yet to be determined – that such information would have any bearing on the civil remedies or orders a tribunal or court may make as regards the applicant; the general intent of which would be to ensure he is compensated for any loss he might be able to establish,<sup>32</sup> rather than 'punish' any individual for unrelated matters.<sup>33</sup>
30. I can identify no other factors favouring disclosure of the information in issue, noting many are plainly of no application in the circumstances of this case.<sup>34</sup> It is, for example, difficult to conceive how disclosure of information concerning an individual business operator could reasonably be expected to contribute to positive and informed debate on serious issues.<sup>35</sup> Further, there is nothing before me suggesting deficient conduct on the part of OFT or any other agency, investigation into which might be allowed or assisted by disclosure of the information remaining in issue,<sup>36</sup> nor misconduct, negligent, improper or unlawful conduct by any agency or official that might stand to be revealed by disclosure of that information.<sup>37</sup>
31. Nor is it apparent that any of the information in issue is incorrect, misleading etc., such that disclosure might reasonably be expected to reveal same,<sup>38</sup> and I cannot see how disclosure of the information in issue could reasonably be expected to reveal environmental or health risks or measures relating to public safety,<sup>39</sup> contribute to the protection of the environment,<sup>40</sup> peace and order,<sup>41</sup> or innovation and the facilitation of research.<sup>42</sup>

### **Factors favouring nondisclosure**

32. There are a number of factors favouring nondisclosure of the information in issue.
33. Firstly, the information comprises the personal information<sup>43</sup> of persons other than the applicant, disclosure of which the RTI Act presumes would give rise to a public interest harm.<sup>44</sup>
34. Generally speaking, disclosure of this information could also reasonably be expected to prejudice the protection of relevant individuals' right to privacy.<sup>45</sup>

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<sup>32</sup> That is, to put the applicant as far as possible in the position in which he would have been, had any substantiated wrong not occurred.

<sup>33</sup> Noting that any information about any unsubstantiated complaints made by persons other than the applicant would not seem to advance his cause in any respect whatsoever.

<sup>34</sup> For example, schedule 4, part 2, item 4 of the RTI Act (the information not in any way concerning expenditure of public funds), and items 7-9 (the information neither being the applicant's personal information, that of any child for which he is a parent, or of a deceased person, for whom he is an eligible family member).

<sup>35</sup> Schedule 4, part 2, item 2 of the RTI Act.

<sup>36</sup> Schedule 4, part 2, item 5 of the RTI Act.

<sup>37</sup> Schedule 4, part 2, item 6 of the RTI Act.

<sup>38</sup> Schedule 4, part 2, item 12 of the RTI Act, noting that to the extent any of it comprises subjective opinion, there is nothing to suggest that it is 'unfairly' so, ie, that it reflects anything other than opinion honestly held.

<sup>39</sup> Schedule 4, part 2, item 14 of the RTI Act.

<sup>40</sup> Schedule 4, part 2, item 13 of the RTI Act.

<sup>41</sup> Schedule 4, part 2, item 15 of the RTI Act.

<sup>42</sup> Schedule 4, part 2, item 19 of the RTI Act.

<sup>43</sup> Personal information is 'information or an opinion...whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion': *Information Privacy Act 2009* (Qld) (**IP Act**), section 12. I am satisfied the information in issue comprises information of this kind, the information being about persons whose identities are apparent on the face of the pages in issue, or reasonably ascertainable from relevant information.

<sup>44</sup> Schedule 4, part 4, section 6 of the RTI Act.

<sup>45</sup> Schedule 4, part 3, item 3 of the RTI Act. The concept of 'privacy' is not defined in either the RTI or IP Acts; it can, however, be viewed as the right of an individual to preserve their personal sphere free from interference from others (Paraphrasing the Australian Law Reform Commission's definition of the concept in "For your information: Australian Privacy Law and Practice" *Australian Law Reform Commission Report No. 108* released 11 August 2008, at paragraph 1.56). I am satisfied information of the kind in issue – such as residential addresses and contact particulars, information detailing interpersonal

35. I am further satisfied that disclosure of information requested in Part 2 of the access application, as recorded in pages 8-9, 23-24 and 145-146, would not only give rise to the personal information public interest harm and privacy nondisclosure factors discussed above, but could also reasonably be expected to prejudice the public interest in treating persons fairly<sup>46</sup> (as it would result in the dissemination of unsubstantiated allegations),<sup>47</sup> and to have an adverse reputational impact on the third party, therefore prejudicing the third party's business affairs.<sup>48</sup>
36. These are all considerations warranting substantial weight.

### **Applicant's submissions**

37. The applicant contests my characterising the information in issue as personal information, submitting that this information comprises the third party's 'business', rather than personal, information.<sup>49</sup>
38. As I advised the applicant by letter dated 14 February 2019, the fact information relates to an individual's business or trading activity is irrelevant for the purposes of determining whether that information comprises personal information – all that is required is for the information to come within the definition stated in section 12 of the of IP Act, that is, to comprise:

*information or an opinion, ... whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.*

39. As noted above, I am satisfied that this is the case: individual identities being apparent, or reasonably ascertainable, from relevant information. (I also stress that some of this information concerns individuals other than the third party, while other segments, although pertaining to the third party, are entirely unrelated to her trading activity, eg, residential address).
40. The activity to which a particular instance of personal information relates – such as business activity – may have a bearing on the extent or gravity of public interest harm the RTI Act presumes will result from disclosure. With this in mind, I accept that some of the personal information in issue may not be especially sensitive. As discussed further below, however, there are no public interest considerations of any particular weight telling in favour of its disclosure, and while it might be argued that the public interest harm resulting from its disclosure may thus not be particularly extensive, it is nevertheless established, and sufficient to tip the balance of the public interest in favour of nondisclosure of this information.

### **Balancing the public interest**

41. Key public interests favouring disclosure in cases of this kind are in enhancing the accountability of regulatory bodies such as OFT for the way in which they investigate complaints, and ensuring complainants are given access to information that may assist them to better understand the actions taken by those bodies in response to their

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interactions and opinions about those interactions, information concerning complaints made by and about individuals other than the applicant, and compliance information going to an individual's personal conduct – falls within relevant individuals' 'personal spheres'.

<sup>46</sup> Schedule 4, part 3, item 6 of the RTI Act, the person here being the third party business operator.

<sup>47</sup> It being the case that the mere existence of a complaint is not evidence of its truth.

<sup>48</sup> Factors favouring nondisclosure of information: Schedule 4, part 3, items 2 and 15 of the RTI Act.

<sup>49</sup> Applicant's submissions dated 20 January 2019. He made similar submissions in his application for external review.

complaints. These public interests have, however, been substantially if not entirely met in this case via disclosure of what information has been released to the applicant, including during the course of this review.

42. There is, on the other hand, a strong public interest in ensuring government protects personal information and safeguards individual privacy, and in persons being treated fairly and protected from unfair harm to personal and professional reputation, including through dissemination of unsubstantiated allegations.
43. Thus, while disclosure of the information in issue would advance the general public interest in promoting access to government-held information – and disclosure of parts of that information may, as noted, confer some insight into how OFT discharges its regulatory duties, disclose background or contextual information, and/or help to foster informed markets to a limited degree – release of any of it would require compromise of the strong public interests summarised in the preceding paragraph.
44. As for information requested in Part 2 of the access application, I note that, should my understanding as to the lack of relevance of this type of information in assessing any compensation claimed by the applicant be incorrect,<sup>50</sup> it still remains the case that the question of appropriate remedies is one that turns first on the applicant successfully establishing a claim. I am not persuaded that unconditional disclosure of personal information now, in service of a possibility that may never eventuate and for which that personal information may thus never be required, would serve the public interest;<sup>51</sup> indeed, it would, in my view, be contrary to the public interest.
45. In the circumstances, and taking into account the amount and nature of information that has been disclosed to the applicant, in this case I consider factors favouring nondisclosure discussed above outweigh those favouring disclosure. Accordingly, I consider that disclosure of the information in issue would, on balance, be contrary to the public interest.

## DECISION

46. I vary the decision under review. Some information may, as noted above, be deleted as irrelevant, under section 73 of the RTI Act. Access to any of the information in issue may be refused under section 47(3)(b) of the RTI Act, for the reasons explained above.
47. I have made this decision under section 110(1)(a) of the RTI Act, as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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**Louisa Lynch**  
**Right to Information Commissioner**

**Date: 3 September 2019**

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<sup>50</sup> See paragraph 29.

<sup>51</sup> Noting that even if an 'administration of justice' public interest consideration can be established in a particular case, this is not determinative – it simply represents one consideration to be taken into account in balancing the public interest. In this case, my view is that the factors favouring nondisclosure of the Part 2 information warrant a weight that displaces any that might tell in favour.



## APPENDIX

### Significant procedural steps

Date	Event
24 July 2018	OIC received the applicant's external review application.
26 July 2018	OIC notified the Department and the applicant that the external review application had been received and requested procedural documents from the Department.
27 July 2018	OIC received the procedural documents from the Department.
9 August 2018	OIC notified the Department and the applicant that the external review application had been accepted for review, and asked the Department to provide the information in issue.
22 August 2018 and 20 September 2019	The Department provided OIC with copies of the information in issue
9 October 2018	OIC wrote to the Department, conveying a preliminary view that grounds did not exist for refusing access to some information.
1 November 2018	The Department advised OIC it accepted OIC's preliminary view.
6 November 2018	OIC wrote to the third party to obtain the third party's views as to possible disclosure of information. OIC also wrote to the Department, confirming its acceptance of OIC's 9 October 2019 preliminary view.
29 November 2018	The third party advised OIC that they did not object to disclosure of relevant information.
6 December 2018	OIC wrote to the third party, confirming the third party did not object to disclosure of information. OIC wrote to the Department, asking that it prepare information for disclosure to the applicant.
13 December 2018	OIC requested the Department arrange disclosure of some information to the applicant. OIC wrote to the applicant, setting out a preliminary view that other information was irrelevant to his application, and/or that access may be refused under the RTI Act.
20 January 2019	OIC received submissions from the applicant.
14 February 2019	OIC wrote to the applicant, reiterating our 13 December 2018 preliminary view and inviting final submissions.
16 February 2019	The applicant the external review be suspended.
18 February 2019	OIC accepted the applicant's request for suspension.
25 July 2019	The applicant requested the external review be progressed to formal decision.
30 July 2019	OIC contacted the applicant and the Department, advising that a formal decision would issue.