



## Decision and Reasons for Decision

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<b>Citation:</b>	<b><i>H23 and Crime and Corruption Commission [2024] QICmr 11 (20 March 2024)</i></b>
<b>Application Number:</b>	<b>317611</b>
<b>Applicant:</b>	<b>H23</b>
<b>Respondent:</b>	<b>Crime and Corruption Commission</b>
<b>Decision Date:</b>	<b>20 March 2024</b>
<b>Catchwords:</b>	<b>ADMINISTRATIVE LAW - RIGHT TO INFORMATION - REFUSAL TO DEAL - application for access to transcripts of coercive hearings conducted by a crime body - whether application expressed to relate to all information of a stated kind - whether all of the documents to which the application relates would comprise exempt information - section 40 and schedule 3, section 10(3) of the <i>Right to Information Act 2009 (Qld)</i></b>

### REASONS FOR DECISION

#### Summary

1. The applicant applied to the Crime and Corruption Commission (**CCC**) under the *Right to Information Act 2009 (Qld)* (**RTI Act**) for access to ‘*transcripts of CCC Coercive hearings*’ for three named individuals on specified dates.<sup>1</sup>
2. The CCC decided<sup>2</sup> to refuse to deal with the application under section 40 of the RTI Act on the ground that all of the requested documents contained information of a stated kind that was exempt information under schedule 3, section 10(3) of the RTI Act.
3. The applicant applied<sup>3</sup> to the Office of the Information Commissioner (**OIC**) for external review of the CCC’s decision.
4. For the reasons explained below, I decide to affirm the decision under review.

#### Background

5. In his application for external review, the applicant provided information regarding his understanding of the background to the relevant CCC coercive hearings, which involved an investigation into matters concerning a child.

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<sup>1</sup> Application received on 20 July 2023 and validated on 25 August 2023.

<sup>2</sup> Decision dated 18 September 2023.

<sup>3</sup> Application received on 16 October 2023.

## Reviewable decision

6. The decision under review is the decision of the CCC dated 18 September 2023.

## Evidence considered

7. Evidence, submissions, legislation and other material I have considered in reaching this decision are set out in these reasons (including footnotes and the Appendix).<sup>4</sup>
8. I have also had regard to the *Human Rights Act 2019* (Qld) (**HR Act**),<sup>5</sup> particularly the right to seek and receive information.<sup>6</sup> I consider that, in observing and applying the law prescribed in the RTI Act, 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>7</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>8</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>9</sup>

## Issue for determination

9. The issue for determination is whether the CCC was entitled to decide to refuse to deal with the access application under section 40 of the RTI Act.

## Relevant law

10. Section 39 of the RTI Act provides that where an access application is made, an agency should deal with the application unless this would, on balance, be contrary to the public interest. Section 40 of the RTI Act provides one set of circumstances in which Parliament has considered it would, on balance, be contrary to the public interest to deal with an access application.
11. Section 40(1) of the RTI Act allows an agency to refuse to deal with an application if:
  - (a) the application requests all documents, or all documents of a stated class, that contain information of a stated kind or relate to a stated subject matter; and
  - (b) it appears to the agency that all of the documents to which the application relates are comprised of exempt information.<sup>10</sup>
12. Section 40(2) of the RTI Act provides that the agency may refuse to deal with the application without having identified any or all of the documents.
13. In *Commissioner of the Police Service v Shelton & Anor*,<sup>11</sup> the Queensland Court of Appeal discussed in detail the operation of section 59 of the *Information Privacy Act 2009* (Qld) (**IP Act**), which is identical in its terms to section 40 of the RTI Act. In

<sup>4</sup> Including the applicant's external review application and the applicant's submissions on 15 January 2024, 19 February 2024, and 5 March 2024, and the CCC's submissions on 29 November 2023 and 1 February 2024.

<sup>5</sup> Relevant provisions of which commenced on 1 January 2020.

<sup>6</sup> Section 21(2) of the HR Act.

<sup>7</sup> *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) (**XYZ**) at [573]; and *Horrocks v Department of Justice (General)* [2012] VCAT 241 (2 March 2012) at [111].

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

<sup>9</sup> *XYZ* at [573].

<sup>10</sup> Section 48(2) of the RTI Act defines 'exempt information' as the information described in the categories of information contained in schedule 3, the disclosure of which Parliament has deemed to be contrary to the public interest.

<sup>11</sup> [2020] QCA 96 at [40] to [48] (**Shelton**).

considering whether a decision-maker is entitled to reach a view about the status (as containing exempt information, or otherwise) of the documents to which the access application relates by reference to the kind of information which documents of that kind usually contain, the court found this approach was appropriate where the relevant exemption provision relied upon contains no exclusions which may require attention to the particular documents in question. But where the relevant exemption provision contains an exclusion that requires attention to be paid to the contents of the requested documents (such as in schedule 3, sections 10(1) and 10(2) of the RTI Act), the court found that a decision-maker could not ordinarily reach the view necessary under section 59(1)(b) of the IP Act (section 40(1)(b) of the RTI Act) without a consideration of the responsive documents to ascertain whether they fell within the listed exclusions: *'However, that will not necessarily be the case for other categories of exempt information under sch 3, which may permit the forming of an opinion in relation to the documents subject to a particular application by reference to the kind of information sought, without more'*.<sup>12</sup>

14. Schedule 3, section 10(3) of the RTI Act, upon which the CCC relies and which is not subject to any exclusions, categorises information by way of the circumstances of its creation,<sup>13</sup> by providing that information is exempt information if:
- (a) it was given in the course of an investigation of a contravention or possible contravention of the law (including revenue law); and
  - (b) the information was given under compulsion under an Act that abrogated the privilege against self-incrimination.

### The applicant's submissions

15. On external review, the applicant<sup>14</sup> raised the following four issues in support of his case that the CCC's decision should be set aside:
- 1. the CCC had failed to consider the RTI Act's pro-disclosure bias in deciding to refuse to deal with the access application
  - 2. the CCC had failed to consider the public interest in disclosure of the requested information
  - 3. the CCC's investigation was unlawful because it fell outside the CCC's jurisdiction as contained in the *Crime and Corruption Act 2001* (Qld) (**CC Act**); and
  - 4. the CCC had failed to establish that coercive powers under the CC Act had been used to obtain the requested information.

### Findings

#### Issue 1

16. The applicant argued that the CCC *'failed to consider the clear legislated intent for a pro-disclosure bias pursuant to section 39 of the RTI Act'*.<sup>15</sup>
17. Section 39(1) of the RTI Act provides that it is Parliament's intention that if an access application is made to an agency, the agency should deal with the application unless this would, on balance, be contrary to the public interest. Section 39(2) provides that sections 40, 41 and 43 state the only circumstances in which Parliament considers it

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<sup>12</sup> *Shelton* at [48].

<sup>13</sup> *Shelton* at [44].

<sup>14</sup> The applicant was legally represented throughout the review.

<sup>15</sup> Submission dated 15 January 2024.

would, on balance, be contrary to the public interest to deal with an access application. Section 39(3) provides that it is Parliament's intention that the RTI Act should be administered with a pro-disclosure bias and an agency may deal with an access application even if the RTI Act provides that the agency may refuse to deal with the application.

18. Accordingly, while an agency may consider that there are valid grounds to refuse to deal with an application, it can nevertheless exercise the discretion contained in section 39(3) of the RTI Act to decide to deal with the application. It is important to note that this discretion lies solely with the relevant agency, and not with OIC on external review:

*...the intention of a pro-disclosure bias expressed in [section 39(3)] relates to the exercise of a choice, notwithstanding an entitlement to refuse to deal with an application, to do so anyway.<sup>16</sup>*

19. In this case, the CCC considered that section 40 of the RTI Act applied to the terms of the access application and declined to exercise its discretion to deal with the application. OIC has no jurisdiction to review the CCC's decision regarding the way in which it exercises its discretion. The applicant's argument is misconceived and I have not taken it into account in making my decision.

## **Issue 2**

20. The applicant argued that the pro-disclosure bias in the RTI Act required the CCC to turn its mind to the public interest in favour of disclosure of the requested information. In his application for external review, the applicant identified a number of public interest factors that he contended weighed in favour of disclosure. Again, I consider the applicant's argument in this regard is misconceived and I have not taken account of it in making my decision.

21. Section 44(1) of the RTI Act provides that if an access application is made to an agency for a document, the agency should give access to the document unless giving access would, on balance, be contrary to the public interest. Section 44(2)(a) and section 48 provide that schedule 3 sets out categories of exempt information, the disclosure of which Parliament has already decided would, on balance, be contrary to the public interest. Accordingly, where, as in this case, an agency has decided that the requested information would qualify for exemption under schedule 3, section 10(3), it is not necessary for the agency to go on to consider the application of the public interest balancing test to the information:

*The scheme of the legislation is clear enough. If and to the extent that a document comprises information which is exempt under s 48, the agency may refuse access to it under s 47(3)(a). In such a situation, it is unnecessary to consider the public interest balance test in s 49.<sup>17</sup>*

22. While section 44(4) provides that an agency may exercise its discretion to give access to a document even if it is satisfied that the RTI Act provides that access may be refused, OIC has no such discretion on external review.<sup>18</sup>

## **Issues 3 and 4**

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<sup>16</sup> *Shelton* at [39].

<sup>17</sup> *Dawson-Wells v Office of the Information Commissioner & Anor* [2020] QCATA 60 at [10].

<sup>18</sup> Section 105(2) of the RTI Act.

23. In respect of these issues, the applicant contends that the CCC was not entitled to refuse to deal with the access application under section 40 of the RTI Act because the requested information does not, in fact, satisfy the requirements for exemption under schedule 3, section 10(3) of the RTI Act.
24. In respect of issue 3 – that the CCC’s investigation exceeded the limits of its jurisdiction under the CC Act – the applicant submitted as follows:<sup>19</sup>

...

*We note that the CCC has erroneously classified this child protection matter as a “major crime”. We also noted the CCC had exceeded their legislated powers. Accordingly, CCC’s reliance on the “exempt information” provisions would be unfeasible, as they simply do not have the legislative authority to intervene in this matter.*

*We reiterate the legislated purpose of the Crime and Corruption Act 2001 is found in section 4 of the Act being:*

- (a) to combat and reduce the incidence of major crime; and*
- (b) to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.*

*It would be ludicrous if the CCC could arbitrarily expand its legislative powers by classifying any child protection matter as a “major crime”, thereby bypassing public interest considerations and refusing to disclose any information by invoking the “exempt information” provisions.*

*This would constitute an abuse of power and contradict the legislated purpose of the Crime and Corruption Act 2001.*

25. In respect of issue 4, the applicant submitted that the CCC was required to establish that the requested coercive hearing transcripts in fact contained information that was provided under compulsion under the CC Act which abrogates the privilege against self-incrimination:<sup>20</sup>

*We note that the law relates only to the investigation of a contravention or possible contravention within the remit of the CCC’s powers. It does not relate to all laws. The CCC powers have been limited by parliament to investigate only those laws as detailed above. The CCC have failed to identify which major crime or corruption is being investigated that necessitated the interview of the three parties.*

*We note the Crime and Corruption Act 2001 provides the CCC with the power under sections 190 and 197 to abrogate the privilege against self-incrimination. However, this does not resolve the factual question of whether, in this case, the information was given by CCC under a compulsion. This has not been confirmed in the response by the CCC. In order to confirm that the information was given under their coercive powers, at the very least, the CCC would need to turn their mind to the content of the interviews.*

*In Independent Extrusions Pty Limited and Department of Education; V20 (Third Party) [2020] QICmr 32, the Assistant Commissioner found that where an Act gives investigators the power to compel information, but they did not use that power, the information cannot be exempt from release under this section. It is not sufficient that the party from whom the information was acquired may have felt compelled to cooperate or that it was pragmatic to provide information; there must be sufficient evidence that the compulsory power was actually exercised against them.*

*Accordingly, the CCC will need to examine the material and confirm to the OIC that the coercive powers have been exercised in the investigation of the child protection proceedings.*

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<sup>19</sup> Submission dated 15 January 2024.

<sup>20</sup> Submission dated 15 January 2024.

*If the CCC is unable to confirm that the coercive powers have been exercised by the CCC, then the information cannot be exempt under section 10(3).*

26. It is important to remember that the deciding factor in applying section 40 of the RTI Act is the words used by the applicant in describing the subject matter of the documents sought. Deciding whether the access application meets the first requirement of section 40 does not involve examining the documents or identifying exemption provisions and working backwards.<sup>21</sup> The starting point is always what the applicant has written in their access application.
27. Based merely on the description of the requested information that the applicant provided in his access application – transcripts of evidence given by three individuals during a CCC ‘coercive hearing’ – I consider that the CCC was entitled to reach a view about the status of the requested information (as qualifying for exemption, or not) by reference to the usual circumstances under which information of that kind is created, without the need to identify the requested information. That is, I consider it was reasonably apparent to the CCC, from both the description of the requested information, and having regard to the CCC’s powers and usual procedures when obtaining information during a ‘coercive hearing’ held under the CC Act, that:
- the information would have been given to the CCC in the course of an investigation by the CCC into a contravention or possible contravention of the law; and
  - the information would have been given under compulsion under the CC Act that abrogates the privilege against self-incrimination.
28. Given that the terms of the access application were clear in requesting access to a category of documents that was wholly comprised of exempt information, I do not accept that, in proposing to rely upon section 40, the CCC was first required to locate the responsive documents and inquire into the issues the applicant has raised on external review. To do so would defeat the purpose of section 40. As noted above, for the purposes of applying section 40 of the RTI Act, it is relevant that schedule 3, section 10(3) is not subject to any exclusions, and that the information that falls within this exemption is characterised by way of the circumstances of its creation, rather than its contents.<sup>22</sup> In such circumstances, and applying the principles in *Shelton*, I consider it was reasonable for the CCC to have formed a view about the requested documents by reference to the kind of information sought, without more.
29. Nevertheless, in conducting a merits review of the CCC’s decision under the RTI Act, I accept that OIC is charged with making the correct and preferable decision according to the material facts and circumstances that apply at the time OIC comes to make its decision.<sup>23</sup> Accordingly, I sought the CCC’s response to issues 3 and 4 in order to consider the issues further. In respect of issue 3, the CCC responded as follows:<sup>24</sup>

*The Applicant’s contention that the CCC interfered with a ‘child protection matter’ is misguided. The CCC authorised an investigation into [deleted] following a referral made by the Queensland Police Service (QPS) under the Serious Crime (Vulnerable Victims) Referral. The investigation was not in furtherance of child protection proceedings, but rather to investigate a suspected criminal offence.*

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<sup>21</sup> *Knight v Corrections Victoria* [2010] VSC 338 at [92] which discussed a similar provision in the Victorian *Freedom of Information Act 1982*.

<sup>22</sup> *Shelton* at [44].

<sup>23</sup> *Palmer and Townsville City Council* [2019] QICmr 43 (3 October 2019).

<sup>24</sup> CCC’s submission dated 1 February 2024.

Generally speaking, the CCC has the authority to investigate major crime<sup>25</sup> or undertake specific intelligence operations under an approval or authorisation given by the Crime Reference Committee (CRC), established under section 274 of the CC Act.

'Major crime' is defined in Schedule 2 of the CC Act as including criminal activity that involves an indictable offence punishable on conviction by a term of imprisonment not less than 14 years.

A system of general referrals<sup>26</sup> enables the CCC to investigate areas of major crime referred to it by the CRC. General referrals involve broad categories of major crime comprising organised crime (offences punishable by at least seven years imprisonment), serious crime (offences punishable by at least 14 years imprisonment), criminal paedophilia and terrorism.

The current general referrals include the Serious Crime (Vulnerable Victims) Referral which authorises investigation into offences of homicide or serious harm to a "vulnerable victim". A "vulnerable victim" includes a child that is under the age of 16 years.

The Queensland Police Service (QPS) may apply to the CCC for approval to commence a particular investigation under the Serious Crime (Vulnerable Victims) General Referral. If the CRC is satisfied the investigation is in the public interest, it will refer the matter to the CCC for investigation.<sup>27</sup>

30. In responding to these submissions, and to OIC's preliminary view that the CCC had sufficiently explained the jurisdiction it was exercising, the applicant stated:<sup>28</sup>

*We note again (and you concur) that CCC has specific legislated powers to investigate major crime or corruption. While you have described the CCC as having an "extremely broad jurisdiction", the powers of the CCC are limited through provisions of the CC Act. We note that no examination has been undertaken in the course of your review as to whether the CCC has acted within scope of their legislative powers. It is our view that an examination of the CCC's actions is necessary in order to attract the RTI exemption relied upon.*

*We have previously advised that the use of coercive hearings in an investigation into a child protection matter is well beyond the remit of the CCC to investigate "major crime" or "corruption".*

*It appears you are making a decision without considering whether the CCC has acted beyond power there is no "major crime" or "corruption" being investigated that warrants the interview of [the individuals named in the access application]. We request that our client's position in this regard be included in your decision.*

31. In a subsequent letter, following provision to him of a copy of the CCC's submission dated 1 February 2024, the applicant responded by advising that the submission did not address his concerns raised previously about the CCC acting beyond power, 'notwithstanding the information provided about the CCC's internal procedures'.<sup>29</sup>
32. While the applicant has asserted that the CCC's investigation exceeded the CCC's legislative powers, OIC is not in a position to make a finding in that regard. Nor do I accept that obtaining a copy of the requested transcripts from the CCC would enable OIC to make such a finding. The CCC has explained the powers it was exercising in conducting the investigation. Based on that explanation, I am not satisfied that it is open to me to find that the relevant investigation was beyond the CCC's legislated powers, such as to preclude the application of schedule 3, section 10(3) of the RTI Act

<sup>25</sup> Section 4(1)(a), 5(2) and 25 of the CC Act.

<sup>26</sup> Section 26 and 27 of the CC Act.

<sup>27</sup> Section 28(2) and (3) of the CC Act.

<sup>28</sup> On 19 February 2024.

<sup>29</sup> Letter dated 5 March 2024.

to the requested information. OIC has no investigative jurisdiction under the RTI Act and certainly no role in overseeing the exercise by the CCC of its jurisdiction under the CC Act, or determining whether, in any particular circumstance, that exercise is appropriate or otherwise. Issues of that nature are something that should be raised directly with the CCC itself, or with the Parliamentary Crime and Corruption Committee, which oversees the CCC's performance and activities, and deals with complaints made against the CCC.

33. In respect of issue 4, the CCC responded as follows:<sup>30</sup>

*The Applicant refers to the OIC decision of Independent Extrusions Pty Limited and Department of Education; V20 (Third Party)<sup>31</sup> as authority for the proposition that the CCC is required to examine the relevant 'coercive hearings' transcripts so it can provide confirmation to the OIC that the information contained in the transcripts was given under compulsion.*

*That decision relates to a workplace health and safety matter where the applicant made an application under the RTI Act for access to the "entire file" concerning her workplace accident. The parties were in dispute over whether the information on the file was provided voluntarily or given under a compulsion under the Work Health and Safety Act 2011 (Qld) (WHS Act). The Assistant Commissioner found that where an Act gives investigators the power to compel information, but they did not use that power, the information cannot be exempt from release under Schedule 3, section 10(3) of the RTI Act.*

*Whilst the CCC agrees that the power to compel information must be exercised for the information to be exempt, the decision is markedly different to this matter as the category of documents sought by the applicant in that case was not evident from the terms of the application. The information described in the application as the "entire file" related to notebook entries, Hazard Incident Report Forms, manuals and procedures, and emails. It was not evident from the description of the documents whether the information in question was provided voluntarily or under a compulsion under the WHS Act.*

*...  
Furthermore, the OIC Guidelines provide that identifying and searching for the documents will generally not be required for exempt information provisions that contain no exceptions. Notably, the exemption provided for in Schedule 3, section 10(3) of the RTI Act does not contain any exceptions.*

*Pursuant to section 176 of the CC Act, the CCC may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions, which includes its crime function to investigate major crime referred to it by the CRC.<sup>32</sup>*

*Generally speaking, a witness is compelled to attend a "CCC coercive hearing" under section 82 of the CC Act. At the commencement of a hearing, the Presiding Officer informs the witness that they must answer the questions put to them (unless they have a reasonable excuse)<sup>33</sup> and that they not entitled to remain silent or to refuse to answer questions on a ground of privilege (other than legal professional privilege).<sup>34</sup>*

*The CCC submits that examination of the relevant "CCC coercive hearing" transcripts to discharge its onus is unnecessary in this matter as the terms of the application raise no question as to the category of documents is entirely exempt as all documents of the kind requested would contain information provided under compulsion under the CC Act which abrogates privilege against self-incrimination.*

34. I agree with the CCC's position as stated in its submission. The applicant himself described in his access application the information to which he was seeking as

<sup>30</sup> Submission dated 1 February 2024.

<sup>31</sup> [2020] QICmr 32.

<sup>32</sup> Section 25(2) of the CC Act.

<sup>33</sup> Section 190(1) of the CC Act.

<sup>34</sup> Section 190(2) of the CC Act.



information provided during 'coercive' hearings, indicating that he was aware of the nature of the hearings pursuant to which the information was provided. He continued to describe the hearings as coercive in nature in the submissions lodged during the external review. I note the following relevant provisions contained in the CC Act:

- section 176: the chairperson may authorise the holding of a hearing in relation to any matter relevant to the performance of the commission's functions
- section 82(1): the chairperson may issue a notice requiring a person to attend at a commission hearing to give evidence
- section 82(5): that person must not fail to attend as required by the notice without reasonable excuse
- section 190(1): a witness at a commission hearing must answer a question put to them at the hearing by the presiding officer, unless the person has a reasonable excuse; and
- section 190(2): the person is not entitled to refuse to answer the question on a ground of privilege, other than legal professional privilege.

35. Based on the applicant's description of the requested information, the CCC's submission<sup>35</sup> regarding its usual processes when holding coercive hearings, as well as the relevant provisions of the CC Act, I am satisfied that it was open to the CCC to form the view that the requested information was information of a kind that would have been provided to the CCC in the course of a coercive hearing in which the witnesses were not entitled to refuse to answer a question on the ground of self-incrimination. I am further satisfied that the applicant has not provided evidence to OIC during the external review to dispute the coercive nature of the hearings – he has merely asserted that the CCC should be required to inspect the requested information to confirm that coercive powers were, in fact, used. I do not accept that this is necessary in order for the CCC to discharge its onus on external review.<sup>36</sup> The deciding factor in applying section 40 of the RTI Act is the words used by the applicant in describing the subject matter of the documents sought. The words used by the applicant indicated that the information he was seeking was obtained by the CCC using its coercive powers.

## DECISION

36. For the reasons explained above, I decide to affirm the decision under review. I am satisfied that the CCC was entitled to refuse to deal with the access application under section 40 of the RTI Act on the basis that it appeared that all requested documents contained information of a stated kind that would be comprised of exempt information under schedule 3, section 10(3) of the RTI Act.
37. I have made this decision as a delegate of the Information Commissioner, under section 145 of the RTI Act.

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R Moss  
Principal Review Officer

**Date: 20 March 2024**

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<sup>35</sup> At paragraph 33.

<sup>36</sup> The agency has the onus of establishing that the decision was justified or that the Information Commissioner should give a decision adverse to the applicant (section 87 of the RTI Act).



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

<b>Date</b>	<b>Event</b>
16 October 2023	OIC received the application for external review.
23 October 2023	OIC received preliminary information from the CCC.
21 November 2023	OIC advised the parties that the application for review had been accepted and requested a submission from the CCC in support of its decision.
29 November 2023	OIC received a submission from the CCC.
13 December 2023	OIC communicated a preliminary view to the applicant.
15 January 2024	OIC received a submission from the applicant.
16 January 2024	OIC requested a further submission from the CCC.
1 February 2024	OIC received a supplementary submission from the CCC.
6 February 2024	OIC communicated a further preliminary view of the applicant.
19 February 2024	OIC received a response from the applicant.
20 February 2024	OIC provided the applicant with a copy of the CCC's submission dated 1 February 2024.
5 March 2024	OIC received a response from the applicant.