

## NOTICE OF FILING

### Details of Filing

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File Title:	JAN MAREK KANT v THE AUSTRALIAN INFORMATION COMMISSIONER
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

### Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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No. VID829/2023

Federal Court of Australia  
District Registry: Victoria  
Division: General Division

**JAN MAREK KANT**

Applicant

**THE AUSTRALIAN INFORMATION COMMISSIONER**

Respondent

Date: 16 April 2024

**Applicant's Submissions in Reply**

*(concerning the 14 Feb 2024 Amended Interlocutory Application)*

**BACKGROUND**

1. The Respondent's complete submissions on the 14 Feb 2024 *Amended Interlocutory Application* are set out in the *Outline of Submissions* document he filed on 12 Apr 2024<sup>1</sup>.
2. It must be noted that records attached to the Applicant's 22 Aug 2023 request to the Respondent are not said to form part of that request; it is otherwise relevant to the 22 Aug 2023 request that:
  - a. the Applicant had previously contacted other persons about elements of the same matter; and,
  - b. the IGIS had decided under 11(2)(c) *Inspector-General of Intelligence and Security Act 1986* to not inquire further into a matter that was referred to him by the Applicant. It may be of note that in his 21 Aug 2024 *DECISION* document, the IGIS refers to a complaint made by the Applicant otherwise than to the IGIS<sup>2</sup>.
3. In his 12 Sep 2024 correspondence, the Respondent made known<sup>3</sup> his view that the Applicant's 22 Aug 2023 *request to investigate* includes a 05 Sep 2023 complaint<sup>4</sup>

<sup>1</sup> see: item 3 in the 27 Mar 2024 ORDER of Justice Snaden

<sup>2</sup> see: Respondent's 23 Feb 2024 *Tender Bundle*, pp.11-12

<sup>3</sup> see especially: "**JMK-10**" pp. 15, 18, 26 – 28, noting dates and references to "EN/09186"

<sup>4</sup> see especially: "**JMK-10**" pp. 23, 25, 27, 28, noting dates and references to "CP23/02755"

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about the *Australian Security Intelligence Organisation*. This is seen confirmed by the Respondent in his 12 Apr 2024 *Outline of Submissions* document [4]<sup>5</sup>.

4. The Applicant commenced this proceeding [6] under 39B *Judiciary Act 1903*. The proceeding is no longer limited to a judicial review of administrative decisions made by the Respondent; the Applicant is also suing the Respondent. The Respondent is being sued on behalf of the Commonwealth.
5. The Respondent does not dispute that distinction between the Respondent in this proceeding and *Office of the Australian Information Commissioner* is arbitrary (7). Arbitrariness of such distinction is confirmed by the Respondent with his submissions referring to a *respondent* and *delegates of a respondent* and OAIC. [3 – 6, 16, 20, 22].

### ERRORS

6. The Respondent erred in filing an *Outline of Submissions* for the 14 Feb 2023 *Amended Interlocutory application*. Item 3 in the 27 Mar 2024 ORDER of Justice Snaden required the Respondent to file and serve (complete) written submissions for the 14 Feb 2023 *Amended Interlocutory application* by 4pm on 12 Apr 2024.
7. The Respondent does not dispute that authorities in this proceeding must be limited to those at *legislation.gov.au* (1)<sup>6</sup>. References to case law in the Respondent's *Outline of Submissions* document must be disregarded.
8. The 22 Aug 2023 request to the Respondent did not attach [3.1] an email to the Central Intelligence Agency.
9. The Applicant confirmed [6] that he sought review of a decision as given in the Respondent's 12 September 2023 letter.

### IRREGULARITIES

10. *PART I* of the Respondent's *Outline of Submissions* document is embarrassing [1, 2]. The 22 & 26 Nov 2023 applications are already dismissed.
11. Items 3 to 11 in the Respondent's *Outline of Submissions* document are embarrassing. The relevant [3 – 11] facts appear in documents filed in this proceeding before the 12 Apr 2024 *Outline of Submissions*.
12. Item 13 in the Respondent's *Outline of Submissions* document is embarrassing [13].
13. Item 20 in the Respondent's *Outline of Submissions* document is embarrassing [20].
14. Item 21 in the Respondent's *Outline of Submissions* document is embarrassing [21].
15. Item 23 in the Respondent's *Outline of Submissions* document is embarrassing [23].
16. The Respondent appears to suggest [24] that responding to submissions concerning orders sought by the Applicant requires that the Applicant first apply for those orders; this suggestion is without basis.
17. Without basis, the Respondent seeks in the 14 Feb 2024 *Amended Interlocutory Application* his costs of another review application [25].

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<sup>5</sup>Digits enclosed in brackets point to same-numbered items in the Respondent's 12 Apr 2024 *Outline of Submissions* document.

<sup>6</sup>Digits enclosed in ellipses in point to same-numbered items of the Applicant's 12 Mar 2024 *Submissions*.

## REVIEW APPLICATIONS

18. It should be noted that review provisions mentioned by the Respondent [12] do not form an exhaustive list of provisions empowering the Court to review the Registrar's order.
19. The Respondent appears to have applied [12], under 35A(5) *Federal Court of Australia Act 1976*, for another review of orders made 20 Dec 2023 by Registrar Luxton in relation to the Applicant's interlocutory applications dated 22 and 26 November 2023.
20. The Respondent appears to seek [12], under 35A(5) *Federal Court of Australia Act 1976*, such orders as the Court may think fit on *rehearing de novo* of the Applicant's interlocutory applications dated 22 and 26 November 2023.
21. The Court is bound by 37M(3) *Federal Court of Australia Act 1976* to only exercise powers in a way that promotes the *overarching purpose* of civil practice and procedure provisions. *Rehearing de novo* is anathema to the *overarching purpose* of civil practice and procedure provisions.
22. The Respondent appears to have disguised an application for *rehearing de novo* with benign, embarrassing statements about matters not at issue [1 – 11] in the present application.
23. The Respondent having disguised an application for *rehearing de novo* is *dishonest* within meaning of *Public Service Act 1999* (16); this makes it (17,20) unlawful.
24. The Respondent disguising an application for *rehearing de novo* is seen intended to bring about resolution of a dispute otherwise than *according to law*; this is contrary to the *overarching purpose* of civil practice and procedure provisions (20).
25. The Respondent disguising an application for *rehearing de novo* is seen intended to bring about resolution of a dispute otherwise than *efficiently*; this is contrary to the *overarching purpose* of civil practice and procedure provisions (20).
26. 37M(3) *Federal Court of Australia Act 1976* requires the Court see it fit to deny the Respondent's application for *rehearing de novo*.

## 26 NOV 2023 INTERLOCUTORY APPLICATION

27. It should be noted that the Applicant sought interim orders [13] under 37AI(1) *Federal Court of Australia Act 1976* on 26 Nov 2023 to prevent prejudice to the proper administration of justice caused by making publicly-accessible information that may tend to reveal his intentions with respect to future proceedings. This court can make such an order without determining the merits of an application under 37AI(1) *Federal Court of Australia Act 1976*. 37AI(2) *Federal Court of Australia Act 1976* requires the Court to determine an application as a matter of urgency.
28. Documents filed in this proceeding, including affidavits filed by the Applicant after 26 Nov 2023, are presently accessible to the public. It is to be expected (and the Applicant must assume) that prejudice to the Applicant's interests, as may result from public disclosure of information about this proceeding, is already caused.
29. Limiting the dissemination of any information about this proceeding, to the benefit of the Commonwealth or any other person, after whatever prejudice may befall the Applicant is already caused, would be an injustice.
30. The Respondent and Applicant are in agreement that the dismissal of the 26 Nov 2023 interlocutory application should be affirmed [14].

## 22 NOV 2023 INTERLOCUTORY APPLICATION

31. It should be noted that the enforcement provisions as mentioned by the Respondent **[15]** also empower the Court to grant restraining injunctions.
32. It should be noted that the operation of *APP 12* is not limited to access requests made with reference **[17]** to *APP 12* (or to the *Australian Privacy Principles* or *Privacy Act 1988* generally).
33. 55A(7A) *Privacy Act 1988*, by extension of s.2A, 13(1) & 55A(2) *Privacy Act 1988*, attaches **[16]** 80W(1) to the applicant's right to access information about him under Schedule 1 of the Act.
34. By extension of 80W(3) *Privacy Act 1988*, s.121 *Regulatory Powers (Standard Provisions) Act 2014* empowers **[18]** the Federal Court to grant the injunction sought by the Applicant. A prima facie case **[19,22]** is unnecessary.
35. In submitting that an injunction should not be granted **[2, 18 – 22]**, the Respondent proposes to deny the Applicant access to information about him under Schedule 1 of the Act **[16]**; this enlivens “restraining” provisions of 121(1), 122(1) & 124(1) *Regulatory Powers (Standard Provisions) Act 2014*.
36. Having brought to notice that ss 118, 121 & 122 *Regulatory Powers (Standard Provisions) Act 2014* empower the Court to enforce provisions of *Privacy Act 1988* by injunction **[15]**, the Respondent goes on to submit that the Court is not empowered **[18]** to grant the sought injunction absent a similar access request made to the Respondent under *APP 12* **[17]**.
37. By force of s.124 *Regulatory Powers (Standard Provisions) Act 2014*, a “relevant court” can, by injunction, require production of documents by an APP entity; the requisite access request is taken to be made on application for the injunction.
38. This issues of “Section 80W(1)” in the Respondent's *Outline of Submissions* document turn on the second-to-next section, of the same item of legislation, beneath the last item of *Regulatory Powers (Standard Provisions) Act 2014* brought to notice by the Respondent in reasoning that the sought injunction should not be granted **[15,17,18]**<sup>7</sup>.
39. With mind to the 12 Mar 2024 *Applicant's Submissions* (**11, 52 – 55**) and *List of Authorities* filed by the Applicant<sup>8</sup>, the Respondent is seen using his submissions to screw with the Applicant.
40. The Respondent screwing with the Applicant by use of submissions in this proceeding is *abuse of process*.

## “REASONABLY ACCESSIBLE”

41. The Respondent admitted, for the purpose of this proceeding, the truth of all facts set out in his *Chapter B: Key concepts* document as enclosed in the 26 Jan 2024 *Notice to Admit* filed by the Applicant.

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<sup>7</sup> Note: **[16]** doesn't advance the case of the Respondent.

<sup>8</sup> Refer to: *Provisions* in row 4 of the list.

42. The meaning of “reasonably accessible” [22] is known to the Respondent<sup>9</sup>. The reasonable person test in this instance must have regard to how a reasonable person who is *Information Commissioner* may act in the circumstances.
43. Examination of *Chapter B: Key concepts*<sup>10</sup>, with mind to 6(1), 27(2), 28(1)(c) & 28A(1)<sup>11</sup> *Privacy Act 1988*, shows that the Respondent in this proceeding has *right or power to deal* with all information that:
- a. is information or opinion, whether or not recorded in material form, about:
    - i. an individual whose identity is known to an entity that possesses a record of the information; or,
    - ii. an individual whose identity is known to an entity that can access a record of the information; or,
    - iii. an individual whose identity is known to an entity that has *right or power to deal* with the information; or,
    - iv. an individual who is reasonably identifiable to an entity that possesses a record of the information; or,
    - v. an individual who is reasonably identifiable to an entity that can access a record of the information; or,
    - vi. an individual who is reasonably identifiable to an entity that has *right or power to deal* with the information; and,
  - b. is the subject of an access request consistent with *Privacy Act 1988*; and,
  - c. is information or opinion to which the *Information Commissioner* can gain access.

### COSTS

44. The Applicant seeks that costs of his present application are assessed otherwise than on an indemnity basis. The Applicant seeks that the Court also take into consideration (20) the Respondent having used his submissions to screw with the Applicant.
45. The Applicant seeks that costs of the present application are reserved.
46. The Applicant seeks that costs of the Respondent's application for *rehearing de novo* are assessed otherwise than on an indemnity basis. The Applicant seeks that the Court also take into consideration (20) the Respondent having veiled an application for *rehearing de novo* in ostensibly benign, embarrassing statements about matters not at issue in the 14 Feb 2023 *Amended Interlocutory application*.
47. The Applicant seeks that the costs of the Respondent's application for *rehearing de novo* are reserved.

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<sup>9</sup> Refer to: “JMK-20” p.9

<sup>10</sup> See especially: B.82, B.84 & B.108

<sup>11</sup> As it applies in relation to *regulated entities* by effect of 12B(4) & 12B(5A) *Privacy Act 1988*.