

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, reading "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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IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA REGISTRY
DIVISION: GENERAL

NO. VID 829 OF 2023

JAN MAREK KANT

Applicant

AUSTRALIAN INFORMATION COMMISSIONER

Respondent

**RESPONDENT'S OUTLINE OF SUBMISSIONS REGARDING APPLICANT'S AMENDED
INTERLOCUTORY APPLICATION DATED 14 FEBRUARY 2024**

PART I INTRODUCTION

1. By amended interlocutory application dated 14 February 2024 (the **review application**), the applicant seeks review of an order of Registrar Luxton dated 20 December 2023 (the **Registrar's order**) to dismiss the applicant's interlocutory applications dated 22 and 26 November 2023.
2. For the reasons that follow, the applicant's interlocutory applications dated 22 and 26 November 2023 should be dismissed, with costs.

PART II BACKGROUND

Complaint to the respondent

3. On 22 August 2023, the applicant wrote to the Office of the Australian Information Commissioner (**OAIC**) requesting that the respondent "investigate an interference, by multiple regulated entities, with [the applicant's] rights as prescribed by the *International Covenant on Civil and Political Rights* (ICCPR)".¹ The request attached:
 - 3.1. an email from the applicant to the Central Intelligence Agency dated 18 April 2023;
 - 3.2. a letter from the applicant to the Australian Security Intelligence Organisation (**ASIO**) dated 18 May 2023 seeking access to ASIO records about him;
 - 3.3. an online complaint form from the applicant lodged with the Inspector-General of Intelligence and Security (**IGIS**) dated 2 July 2023 complaining of "multiple and

¹ Respondent's bundle of relevant documents (**RB**) 1-7.

repeated interferences with [his] privacy by one or more intelligence agencies”;
and

- 3.4. a letter from the IGIS to the applicant regarding his correspondence to the IGIS regarding the alleged actions of ASIO.²
4. On 12 September 2023, the delegate of the respondent wrote to the applicant about his complaint.³ The letter indicated that the complaint was that ASIO had mishandled the applicant’s personal information. The letter advised that s 7(1A)(a) of the *Privacy Act 1988* (Cth) (the **Act**) states that any act or practice done by ASIO is excluded from coverage of the Act, and, as an exempt agency, the actions of ASIO cannot be considered an interference with privacy as defined in the Act. Accordingly, the delegate decided that the complaint did not meet the requirements of s 36(1) of the Act and declined to investigate.
5. Between 12 and 21 September 2023, the applicant and the respondent exchanged further correspondence about his request that the respondent conduct an investigation concerning ASIO.⁴

Proceedings before this Court

6. The applicant commenced judicial review proceedings in this Court on 25 September 2023. The applicant has confirmed that the decision that he seeks judicial review of is the decision given by the respondent’s delegate on 12 September 2023.⁵
7. By amended originating application dated 24 January 2024, the applicant seeks:
1. Investigation by the Information Commissioner of the matter described in the applicant’s letter sent on 22 August 2023.
 2. Further action by the Information Commissioner as described in the applicant’s letter sent on 22 August 2023, as amended to omit the original first reference to NACC on its second page and with the same reinserted immediately under the subsequent reference to IBAC.
 3. Orders commanding the Information Commissioner to refrain from taking action as in (1) or (2), unless and until the Applicant requests the Information Commissioner to commence doing so.
 4. Damages, including exemplary damages, claimed against the Commonwealth in respect of tortious conduct of intentional nature in mens rea.
 5. Further damages in lieu of costs.
8. On 22 November 2023, the applicant filed an interlocutory application seeking an injunction under s 80W(1) of the Act and orders commanding the respondent to produce to the applicant all information about him as is reasonably accessible to the OAIC.

² RB 8-12.

³ RB 14.

⁴ RB 15-27.

⁵ Affidavit of Jan Marek Kant affirmed 26 February 2024, exhibit JMK-33.

9. On 26 November 2023, the applicant filed an interlocutory application seeking suppression orders under 37AG(1) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA Act**) in respect of submissions and documents filed in this proceeding on the ground that such orders are necessary to prevent prejudice to the proper administration of justice.
10. On 20 December 2023, at the first case management hearing, Registrar Luxton dismissed the interlocutory applications dated 22 and 26 November 2023.

The review application

11. The review application seeks:
 - 11.1. An order affirming the dismissal of the applicant's application filed on 26 November 2023;
 - 11.2. An order granting the relief sought in the applicant's application filed on 22 November 2023;
 - 11.3. Reasons for decisions on the above; and
 - 11.4. The review application to be heard on the papers.
12. This Court has power under s 35A(5)-(6) of the FCA Act to review the Registrar's order and may make such order or orders as it thinks fit with respect to the matter with respect to which the Registrar's power was exercised. The review is in the nature of a rehearing de novo.⁶

PART III THE 26 NOVEMBER 2023 INTERLOCUTORY APPLICATION

13. The review application seeks for the Registrar's order dismissing the 26 November 2023 interlocutory application to be affirmed. The applicant's submissions (**AS**) at [61] confirm that he no longer seeks the suppression order sought by his 26 November 2023 interlocutory application. Indeed, despite the applicant originally seeking suppression orders, it appears that he is now vehemently opposed to orders being made; AS [62(b)] indicates that the applicant seeks "declaratory suppression orders ... declaring no information or document given or produced in this proceeding can become subject to a suppression order or non-publication order (however described), except as necessary to protect safety of natural persons otherwise identifiable."
14. In light of the applicant's position, the respondent respectfully submits that it would be appropriate to affirm the dismissal of the 26 November 2023 interlocutory application.

⁶ *Guildford International Group Pty Ltd, Aviation 3030 Pty Ltd, Re v Aviation 3030 Pty Ltd* [2018] FCA 600 at [1].

Section 80W(1)

15. Section 80W(1) is a part of the enforcement regime of the Act⁷ and confers power on this Court to enforce provisions of the Act by way of injunction. Section 80W is given operative effect by ss 118, 121 and 122 in Part 7 of the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (the **RP Act**).⁸ Those provisions empower the Court to grant performance injunctions and interim injunctions in relation to provisions of an Act enforceable under the RP Act.
16. Grounds 2(a)-(b) of the review application seek to attach s 80W(1) to the applicant's right to access information about him under Schedule 1 of the Act. Schedule 1 of the Act contains the Australian Privacy Principles (**APP**). APP 12 requires an APP entity⁹ that holds personal information about an individual to, upon request, give the individual access to the information. The OAIC is an APP entity.
17. The flaw in the applicant's position is that he has not applied to the OAIC for access to information that it holds about him. There is no extant access request under APP 12 that can be enforced by way of injunction in a proceeding before this Court (let alone by way of interlocutory injunction as part of a proceeding that does not concern the respondent's compliance with APP 12).
18. The 22 November 2023 interlocutory application should be dismissed because it seeks orders that this Court is not presently empowered to make.

No prima facie case and the balance of convenience does not favour the orders

19. Even if there is some power in s 80W(1) of the Act or elsewhere to require the production of the information sought by the applicant, the applicant has not made out a prima facie case for the orders, and the balance of convenience does not favour the making of the order.¹⁰
20. The issues strictly arising in the substantive review of the respondent's 12 September 2023 decision are very narrow. They turn on whether the respondent has misconstrued the applicant's request for an investigation, and whether the complaint did not meet the requirements of s 36(1) of the Act. There is sufficient material presently before the Court to enable it to determine those issues. The information accessible to the OAIC about the applicant would not shed any light on the issues arising and would not assist the resolution of this proceeding.
21. The applicant has also sought a variety of other relief including damages. Whether such relief is available in an application under s 39B of the *Judiciary Act 1903* (Cth) is a matter that will be addressed in the respondent's submissions on the substantive

⁷ See Part VIB generally.

⁸ *Medibank Private Limited v Australian Information Commissioner* [2024] FCA 117 at [172].

⁹ APP entity is defined in s 6 of the Act to mean "an agency or organisation".

¹⁰ *Beecham Group Limited v Bristol Laboratories Pty. Limited* (1968) 118 CLR 618.

application. Assuming such relief were within the Court's power, it is entirely unclear how production of the information sought by the applicant would advance his case for this relief.

22. Finally, there is a mismatch between the order sought and the provision of the Act the applicant is attempting to rely upon. APP 12 does not extend to requiring an APP entity to produce documents "reasonably accessible" to it. APP 12 is limited to documents the APP entity "holds". The applicant has not made out any prima facie case for requiring the respondent to produce documents "reasonably accessible" to it (whatever that may mean).

PART V OTHER MATTERS RAISED IN THE APPLICANT'S SUBMISSIONS

23. The respondent notes that the applicant's submissions refer to a variety of other orders sought. AS [66] indicates that the applicant will apply for those orders at the case management hearing on 19 April 2024.
24. These submissions do not address the other orders because a) there is not yet an application for those orders and b) the orders of this Court dated 27 March 2024 are limited to submissions concerning the order sought by the review application.

PART VI COSTS

25. The respondent seeks its costs if the review application is dismissed.

Date: 12 April 2024

KYLIE MCINNES
Counsel for the Respondent



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Elena Arduca
AGS lawyer
for and on behalf of the Australian Government Solicitor
Solicitor for the Respondent