

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



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.

The date of the filing of the document is determined pursuant to the Court's Rules.



No. VID829/2023

Federal Court of Australia

District Registry: Victoria

Division: General Division

JAN MAREK KANT

Applicant

THE AUSTRALIAN INFORMATION COMMISSIONER

Respondent

Date: 23 April 2024

Applicant's Submissions in Reply

BACKGROUND

1. By letter to the Respondent sent 22 Aug 2023, the Applicant requested an investigation "*under 12B(2) of the Privacy Act 1988*". The Respondent declined to investigate on the ground¹ that 7(1A)(a) *Privacy Act 1988* states that any act or practice done by *the Australian Security Intelligence Organisation* (ASIO) is excluded from coverage of *Privacy Act 1988*.
2. On the ground² that disclosure of personal information to ASIO is not the issue of the 22 Aug 2023 request, the Applicant sought the Respondent reconsider the decision to not investigate.
3. By way of letter dated 21 Sep 2023, the Respondent confirmed³ his decision to not investigate the matter on the ground that 7(1A)(a) *Privacy Act 1988* states that any act or practice done by ASIO is excluded from coverage of *Privacy Act 1988*.
4. The factual background in the Respondent's 12 Apr 2024 *Outline of Submissions* document [3]⁴ has material omissions and errors⁵.

¹ see: letter in "**JMK-10**" p. 10 (third paragraph)

² see: email in "**JMK-10**" p. 33 (reproduced in another email as in "**JMK-10**" p. 37)

³ see: letter in "**JMK-10**" p. 40 (fourth paragraph)

⁴ Digits enclosed in brackets point to same-numbered items of the Respondent's 16 April 2024 submissions

⁵ see: "**JMK-10**" and "**JMK-34**", taking notice of dates and reference numbers

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5. The grounds of review **[4]** are those in the Applicant's 19 Sep 2023 email to the Respondent.

ERRORS

6. Item 2 in the 27 Mar 2024 *ORDER of Justice Snaden* required the Respondent to file and serve (complete) submissions by 4pm on 16 Apr 2024. The Respondent erred in producing a "*Respondent's Outline of Submissions*"; the content of the document (filed as *Submissions*) must be treated as his complete submissions for the proceeding.
7. The Respondent does not dispute that authorities in this proceeding must be limited to those at legislation.gov.au **(1)**⁶. Each reference to case law and explanatory memoranda must be disregarded. Each reference to ICCPR must be read as references to s.3 Schedule 2 *Australian Human Rights Commission Act 1986*.
8. It is not in dispute that distinction between the *Australian Information Commissioner* and *OAIC* is arbitrary **(7)**, nor that the *Australian Information Commissioner* is party to this proceeding is his capacity as officer of the Commonwealth **(4)**. The Respondent is genderless **[30.2, 30.4, 36]** and each reference to *OAIC* **[4, 4.1, 4.3, 32.1, footnote 21]** or a delegate **[1, 2, 14, 16, 17, 30.2]** in his submissions must be read as reference to the Respondent himself.
9. It is not in dispute that only laws in force on 22 Aug 2023 can apply in this proceeding **(9)**. Laws concerning *Information Privacy Principles* (IPPs) **[21, 22, 24]** do not apply.
10. "**JMK-11**" pp.25-46 refers **[footnote 21]** refers to a privacy complaint to the Respondent about the "*FOI Commissioner*".
11. The amended originating application isn't dismissed **[38]**.

NATURAL JUSTICE

12. Natural justice requires that false materials, if produced to the Applicant by an officer of the Commonwealth, can be relied on by the Applicant in claims he makes against the Commonwealth.
13. Natural justice requires that officers of the Commonwealth must not rely, in defending claims made by the Applicant or in making claims against him, on false materials produced (first to the Applicant or otherwise) by an officer of the Commonwealth.
14. The Court may have regard to the content of *Knowles v Secretary, Department of Defence* [2020] FCA 13289⁷, as if the document were what it purports to be, to the extent it may advance the case of the Applicant **[32.1]**.

ASIO

15. Item 13 in the Respondent's submissions **[13]** misrepresents the Applicant's contention **(10,11)**.

⁶ Digits enclosed in ellipses point to same-numbered items of the Applicant's 12 Mar 2024 Submissions

⁷ as enclosed in the 23 Feb 2024 *Notice to Admit* (filed by the Applicant)

16. The suggestion that an entity can be exempt-in-general [14, 24] from operation of *Privacy Act 1988* is without basis.
17. An act or a practice “involves” disclosure of personal information to ASIO [9, 14] “only so far” as it is one or several acts of disclosing personal information to ASIO.
18. The intention for *Privacy Act 1988* to be binding on ASIO appears in s.12B *Privacy Act 1988*. Reference “to an act or to a practice” is reference to conduct of ASIO insofar as that makes *Privacy Act 1988* apply also to ASIO or also to the information ASIO holds [15].
19. Insofar as its operation is inconsistent with operation of *Privacy Act 1988* giving effect to ICCPR, 36(1) *Privacy Act 1988* is severed [16] by effect of 12B(2)(a) *Privacy Act 1988*.

ICCPR

20. 7(2) *Privacy Act 1988* gives [10] that, in application of *Privacy Act 1988* otherwise than in respect of the APPs (etc.), reference “to an act or to a practice” is also reference to “an act done” or “a practice engaged in” by an *intelligence agency* (etc.) if that intention appears; the intention appears in 12B(2) *Privacy Act 1988* giving *Privacy Act 1988* also the same effect it would have if its operation in relation to regulated entities were expressly confined to an operation to give effect to ICCPR [11].
21. By investigating an infraction (or alleged infraction) upon rights and freedoms recognised in ICCPR, the Respondent acts to “ensure that (a) person whose rights or freedoms (as recognised in ICCPR) are violated shall have an effective remedy” per Article 2.3 ICCPR [23].
22. 12B(2) *Privacy Act 1988* makes investigating infractions (or alleged infractions) upon rights and freedoms recognised in ICCPR a function [25] of the *Information Commissioner*.
23. 27(2) *Privacy Act 1988* empowers the *Information Commissioner* to do all things necessary or convenient to be done for, or in connection with, investigating an infraction (or alleged infraction) upon rights and freedoms recognised in ICCPR [23].
24. Nothing in ICCPR excludes *intelligence agencies* from its operation; ASIO is not exempt from operation of *Privacy Act 1988* as gives effect to (all of) the ICCPR [7, 9 – 11, 17, 23, 24].
25. The suggestion [21, 24] that ICCPR might not override exemptions in *Privacy Act 1988* is without basis (see item 9 above).
26. *Privacy Act 1988* is seen [24] to apply to:
 - a. Directors-General and ASIO employees and agents of the Organisation by effect of the words in 18(4B) *Australian Security Intelligence Organisation Act 1979*; and therefore,
 - b. ASIO generally by effect of s.93 *Australian Security Intelligence Organisation Act 1979* (44) and 12B(4) *Privacy Act 1988*.

TORTS

27. The Respondent admitted **(19)** the truth of Chapter 2 *Criminal Code* applying in torts of intentional and reckless *mens rea*. Attempt to engage in relevant conduct is made sufficient cause for action by effect of s.11.1 *Criminal Code*.
28. A suggestion that s.80 *Judiciary Act 1903* may not apply in relation to torts as the Applicant submitted **(28, 37, 45, 46)** is without basis **[34, 35]**.
29. Items 27 of the Respondent's submissions misrepresent the Applicant's grounds **(24, 27, 29, 32, 34 – 37, 44, 45)** for seeking damages against the Commonwealth **[27]**.

Tortious abuse of process

30. A person who acts to secure judgment in favour of a counterparty to a proceeding commits *abuse of process* **[30]** and breaches a duty to refrain from doing so; if such *abuse of process* causes a person to suffer loss, it is tortious *abuse of process* **(27, 28)**.
31. The Applicant's claims to damages in tortious *abuse of process* **[29]** are not claims in respect of abuses intended to achieve a collateral purpose **(24, 27 – 29)**.
32. Item 30.4 of the Respondent's submissions misrepresents **[30.4]** the Applicant's contention **(24, 27)**.

Disprivacy

33. Orders requiring that the Respondent do things as in the 22 Aug 2023 letter would cause procurement of the Applicant's personal information (including sensitive information); this was intended **(10, 11, 24, 27, 36)**.
34. "*Disprivacy*" is an arbitrary term **[32.2]** used by the Applicant in describing a particular tort which he asserts to exist in common law **(1)**. The Respondent has admitted the truth of the facts of tort of *disprivacy* in common law **(19)**.
35. Damages for injury to feelings⁸ and exemplary damages **[32]** may be awarded in *disprivacy*.
36. Lawfulness of conduct such as that referred to in item 32.1 of the Respondent's submissions **[32.1, footnote 21]** is challenged in submissions concerning serious and repeated interference **(31 – 44, 46)**.
37. The Applicant relies on s.80 *Judiciary Act 1903* **(37)** and the common law **(1, 8, 19, 24, 31 – 46)** in Australia (as modified by the Constitution and statute law) in force by effect of *Regulatory Powers (Standard Provisions) Act 2014* and *Privacy Act 1988* as also extended by ICCPR; authorisation is not required **[32.3]**.
38. The Applicant does not **(24, 32)** allege the Respondent uses the proceeding itself **[30.3]** for obtaining personal information about him.

⁸ relevantly including "acute *facepalm*"

COSTS

39. The Applicant in this proceeding is a person of the kind⁹ mentioned in s.55N *Judiciary Act 1903*. Part VIIC *Judiciary Act 1903* gives that the Applicant cannot rely on legal professional privilege or other duties of confidence for purposes of this proceeding.
40. The provisions of laws for compensating people who become involved in proceedings, as ordinarily apply, are insufficient to carry them into effect in proceedings in which the Commonwealth has a stake and a person of the kind mentioned s.55N *Judiciary Act 1903* is involved; the operation of s.80 *Judiciary Act 1903* is engaged [34 – 37].

⁹ see: “JMK-11” & “JMK-35”