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Kyle Nelsen (SD)		BETWEEN:	
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Court File No.

FEDERAL COURT

EMMA BRIANT

APPLICANT

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT

NOTICE OF APPLICATION

Application for judicial review under sections 41 and 44 of the *Privacy Act*, RSC 1985, c P-21 and section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard at the Federal Court in Vancouver, British Columbia.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

September 18, 2024

Issued by REGISTRY OFFICER

Vancouver Local Office
Pacific Centre
PO Box 10065
701 West Georgia Street
Vancouver, BC V7Y 1B6

Bureau local du Vancouver
Pacific Centre
CP 10065
701, rue West Georgia
Vancouver, CB V7Y 1B6

TO:	OFFICE OF THE REGISTRAR FEDERAL COURT
AND TO:	Attorney General of Canada Director, Vancouver Regional Office Department of Justice Canada #900, 840 Howe Street Vancouver, BC V6Z 2S9 Email: AGC_PGC_VANCOUVER@JUSTICE.GC.CA
AND TO:	Office of the Privacy Commissioner of Canada 30 Victoria Street Gatineau, QC K1A 1H3

APPLICATION

This is an application for judicial review in respect of a deemed refusal by the Department of National Defence to disclose personal information requested by the Applicant under sub-section 12(1) of the *Privacy Act*, RSC 1985, c P-21 (DND File P-2023-06238) (the “Request”).

By its report of findings issued August 5, 2024, OPC File Number PA-067793, further to sub-section 35(3) of the *Act*, the Office of the Privacy Commissioner of Canada found that the Department of National Defence has exceeded the time limits set out in the *Act* and is deemed to have refused the Request.

The Applicant makes application for:

1. An order under paragraph 18.1(3)(a) of the *Federal Courts Act*, RSC 1985, c F-7, compelling the Department of National Defence provide the Applicant with access to the requested information as required by section 14(b) of the *Privacy Act*; and
2. A declaration that the Department of National Defence has failed to meet its obligations under the *Privacy Act*, including its duty to offer reasonable assistance.

The grounds for the application are:

Failure to Respond

1. On February 28, 2024, the Applicant filed a request for access to personal information under section 12(1) of the *Privacy Act* with the Department of National Defence (the “Department”) through the Department’s online portal.
2. On May 16, seventy-eight days (fifty-seven processing days) after filing the Request and after multiple exchanges with the Department, the Applicant filed a complaint with the Privacy Commissioner of Canada.
3. On August 5, 2024, the Office of the Privacy Commissioner issued its Report of Findings on the Applicant’s complaint. The Report found that, as of August 1, 2024, one hundred and thirty-seven processing days had elapsed, that no response had been received, and that the Request is deemed to have been refused further to sub-section 16(3) of the *Act*.

4. Section 14 of the *Privacy Act* requires that a government institution respond to an information request within 30 days. Further to section 15 of the *Act*, the head of a government institution can respond by extending this period of time for a maximum of an additional 30 days, where such an extension is determined to be justified. No such determination has been made or issued by the Department.
5. As of the filing of this Application, one hundred and eighty-six processing days (two hundred and four actual days) have elapsed, and no response to the Applicant's Request has been received.

Breaches of Duty to Provide Reasonable Assistance

6. Throughout this period, the Department has, on multiple occasions, breached its obligations under the *Act* by failing to meet its duty to provide reasonable assistance to the Applicant. Rather than provide reasonable assistance, the Department has misrepresented facts, misinterpreted the *Act*, and misled the Applicant, resulting in the unnecessary narrowing of the Applicant's Request as initially framed and contributing to delays in processing the Request. The sequence of these exchanges is outlined below.
7. The Applicant, Dr. Emma Briant, is a scholar and academic researcher who conducts research into the ethics of information operations and propaganda conducted by armed forces around the world. The Applicant's research has included documenting the role of private sector companies that provide training and services to armed forces on, among other things, conducting information operations. The Applicant's research in this regard has inquired into contracts entered into between the Canadian Armed Forces and a company called Emic Consulting Limited. In 2020 and 2021, the Applicant published work on this subject and contributed her expertise to news reporting on influence activities and public affairs by the Canadian Armed Forces.
8. The Applicant subsequently wished to confirm how her information had been treated during this period, for example, whether information may have been leaked from the Department and/or been provided to the Department with the intentions of discrediting the Applicant and any reporting she contributed to. To inquire further into these questions, on February 28, 2024 the Applicant made the Request to the Department as follows:

I am requesting records that contain any references to myself (Dr. Emma Briant), my work or my media engagement, or discussions and analysis of it and responses to it, held by the public affairs branch of the Canadian Forces/Department of National Defence in Ottawa from the period of 24th June 2020 to 30th October 2020. This should include the details of whom any such data was shared with or received from and who holds the data. In case it helps your inquiry, I was formerly Associate Researcher at Bard College in New York State, US currently Associate Professor at Monash University in Melbourne, Australia.

9. It may be seen that the Applicant's Request was directed at any personal information relating to the Applicant and controlled by a specified unit of the Department (the public affairs unit) within a four month time period in 2020. The Request was properly formulated with sufficient specificity for the Department to process it, as required by paragraph 12(1)(b) and sub-section 13(2) of the *Act*.
10. Despite this adequate level of specificity, the Department responded with a series of positions and assertions that can only be described as the proverbial "run-around":
 - a. The Department insisted that paragraph 12(1)(b) of the *Act* requires the Applicant to direct any individual access requests towards specific individual employees of the Department in order for a request to be valid. This was inaccurate as the *Act* applies to personal information under the control of the Department, not under the control of individuals within the Department;
 - b. The Department insisted that it was the Applicant's sole responsibility to identify any individual employees of the Department who might have individual control of such records. This was inaccurate and contrary to the Department's duty to assist an individual who has submitted a request under paragraph 12(1)(b);
 - c. The Department asserted for a period of time that the *Act* does not apply to any personal information in email accounts relating to individuals who are no longer employed by the Department, even if the personal information from these email accounts remains under the control of the Department within the meaning of paragraph 12(1)(b). This assertion was inaccurate and was a position from which the Department eventually resiled; and
 - d. The Department held that "positional" email accounts, which are controlled by multiple different individuals at any given time, are in effect inherently immune from

paragraph 12(1)(b) of the *Act*. This assertion was inaccurate. An email account is a sufficiently specific indication of the location of government-controlled personal information for the purposes of facilitating retrieval of that information, within the meaning of paragraph 12(1)(b) and sub-section 13(2) of the *Act*. Moreover, such a policy would be contrary to the Department's obligation to adopt reasonable record management practices that are conducive to the right to individual access.

11. In each case, the Department's mis-statement of its obligations under the *Act* were accompanied by demands that the Applicant agree to reframe the Request so that it consisted solely of individual names and contained different wording. This unnecessary reframing not only prevented the Applicant from receiving information to which she is entitled, it contributed to forty-two days of the total delay in processing the Request (twenty days of which were not considered processing days by the Department), spanning from the time the Request was filed (February 28) until April 11.
12. On July 4, 2024, twelve weeks after the Applicant agreed, in good faith and relying on the Department's representations, to reformulate the Request, the Department advised that the ongoing inclusion of an email account associated with Major Kirk Sullivan, one of the individual employees named in the Applicant's re-formulated Request, would significantly delay the response. The Department stated that Major Sullivan, despite still being employed by the Department, no longer had access to the email account, and therefore the Department was unable to respond without significant further delay. As explained below, this was yet another misrepresentation by the Department. Using the purported delays that would follow if Major Sullivan's email account was not removed from the Request, the Department encouraged the Applicant to again narrow the scope of Request. The Applicant did so.
13. The Department then stated that it still couldn't respond to the overdue Request because it required "additional clarification from the Office of Primary Interest", and advised that the Department could not estimate the time it might take for the said office to respond. The Applicant replied by asking what needed clarification. The Department ignored this question.
14. The Applicant then asked for partial disclosure of the responsive records that the Department had indicated it had already collected. That request was refused on August 22, 2024, on the purported basis that the *Privacy Act* does not permit partial release of

records. However, nothing in the *Privacy Act* precludes partial disclosure and, in fact, the principle of severability which is “implicit in the Act” in relation to the application of exceptions to disclosure favours partial interim disclosure.

15. As the Applicant continued to be interested in obtaining any responsive information that may be located in Major Sullivan’s email inbox, on July 8, 2024, the Applicant submitted a separate individual access request (DND File #P-2024-02002) as follows:

I am requesting records, including any communications or other documents, that contain any references to myself, Dr. Emma Briant, Dr. Emma Bryant or any other variation of my name and my work or my media engagement, or discussions and analysis of it and responses to it, held by: Maj Kirk Sullivan - This should include the details of whom any such data was shared with or received from and who holds the data. For the period of June 24, 2020 - October 30, 2020.

16. The same officer as was handling the Applicant’s February 28, 2024 request acknowledged receipt of this second request on behalf of the Department. Without any mention of the previously asserted purported challenges associated with accessing Major Sullivan’s account, the Department responded promptly and substantively to the second request, in a letter dated August 15, 2024, signed by a different officer from the Department. The records that were disclosed plainly included emails from Major Sullivan’s email account.
17. The Department’s August 15, 2024 production of records from Major Sullivan’s email account reveals the misleading nature of the Department’s July 4, 2024 advice that such records could not be produced.
18. In summary, as detailed above, on numerous occasions the Department’s advice to the Applicant has been inaccurate and misleading, contrary to its duty under the *Privacy Act* to provide reasonable assistance to the Applicant.
19. Moreover, the Department indicated on a number of occasions that, should the Applicant fail to respond to its demands that she agree to narrow the scope of her Request, the Request would be deemed abandoned. Deemed abandonment is not a basis for refusing an individual access request in line with the *Privacy Act*. If a request is refused on the basis of one of the exceptions in the *Act* or because it is deemed not to meet one of the requirements of sub-section 12(1) of the *Act*, this should be clearly indicated.

20. Further, on multiple occasions, the Applicant requested updates on the processing of the Request. At each stage, the Department provided no timeline or estimate as to how much longer the Request would take to process. At no point did the Department proactively provide any updates as to the processing of the Request.
21. The *Privacy Act* is to be given a broad and liberal interpretation in order to achieve its purpose, with a particular emphasis towards advancing the quasi-constitutional rights to privacy and information that it embodies. In processing the Request, the Department approached its obligations under the *Act* in a narrow and restricted manner that undermined the *Act*'s objectives and the Applicant's right to information as embodied in the *Act*.
22. On judicial review of a deemed refusal to provide individual access further to subsection 12(3) of the *Act*, this Court does not review the adequacy of any disclosure, but can assess the government's failure to provide access to information within the *Act*'s specified time limits as well as the circumstances of that failure.
23. The Applicant relies on:
 - a. *Federal Courts Act*, RSC 1985, c F-7, including sections 18.1(3);
 - b. *Federal Court Rules*, SOR/98-106, including Part 5;
 - c. *Privacy Act*, RSC 1985, c P-21, including sections 12(1), 12(3), 15, 16(3), 41, and 44; and
 - d. Treasury Board of Canada Secretariat, Directive on Personal Information Requests and Correction of Personal Information, August 27, 2023 and other directives and policies adopted further to paragraph 71(1)(d) of the *Privacy Act*.
24. Such other grounds as counsel for the Applicant may advise and this Court may permit.

This application will be supported by the following material:

1. The Affidavit of Dr. Emma Briant sworn September 17, 2024; and
2. Such further and other material as the Applicant may advise and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of September, 2024



Sean Hern, KC and Tamir Israel
Counsel for the Applicant

c/o Sean Hern Law Corporation
185-911 Yates Street, #332
Victoria, BC V8V 4Y9
Fax 778-508-3516
sean@seanhernlaw.com
tamir@digitalprivacy.ca