

**INTERNAL REVIEW REQUEST (8 NOVEMBER)**

From: Michael Cordover

To: AEC

Date: 8 November 2013

Sent via: Email from *Right To Know* website

URL: <http://tinyurl.com/ecfoi-ir-request>

1 Dear Australian Electoral Commission,

2 Please pass this on to the person who conducts Freedom of  
3 Information reviews.

4 I am writing to request an internal review of Australian Electoral  
5 Commission's handling of my FOI request 'Software by which Senate  
6 counts are conducted'.

7 A full history of my FOI request and all correspondence is  
8 available on the internet at this address:

9 [https://www.righttoknow.org.au/request/software\\_by\\_which\\_senate\\_counts](https://www.righttoknow.org.au/request/software_by_which_senate_counts)

10 I also recognise that things are quite busy at the AEC at the  
11 moment. I am happy for this to be taken to have been received as  
12 late as 3 December (30 days from when the original decision was  
13 made) and therefore not to receive a response until early January.  
14 However I am keen not to prejudice any external review rights that  
15 might arise and I consent to the increased time on that basis.

16 Decisions to be reviewed

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18 I refer to the statement of reasons for refusing access given by  
19 Paul Pirani dated 4 November 2013 (received 5 November 2013). There  
20 are three decisions contained in this letter for which I seek  
21 review:

22 1. The decision not to disclose the schedule of documents (reasons  
23 at [24])

24 2. The decision that all of the documents are exempt under s  
25 47(1)(a) as trade secrets (reasons at [7])

26 3. The decision that all of the documents are exempt under s  
27 47(1)(b) as containing commercially valuable information, the value  
28 of which could reasonably be expected to be destroyed or diminished  
29 by disclosure (reasons at [7])

30 As they are closely related, I will deal with the second and third  
31 decisions together.

32 Matters of policy

33 -----

34 Before particularising the reasons I believe the decision was wrong  
35 at law, I note the following matters which suggest to me that the  
36 AEC should release the documents I request as a matter of policy.

37 The AEC s 9 FOI statement  
38 ([http://www.aec.gov.au/about\\_aec/Publications/foi.htm](http://www.aec.gov.au/about_aec/Publications/foi.htm)) provides  
39 that the Easycount Senate User Guide is available under FOI and  
40 does not indicate that it would be exempt or partially exempt.

41 The AEC indicated in its supplementary submission (number 181,  
42 dated 7 February 2003) to the JSCEM inquiry into the 2001 Federal  
43 Election at [8.12] that:

44 "In the interests of transparency, and because there are no  
45 security implications, the code [for EasyCount] will be available  
46 for review."

47 As that statement recognises, confidence in the electoral system  
48 can only exist where the system is transparent. The AEC does an  
49 exceptionally good job and I do not suggest any improper motive for  
50 refusing to disclose this material. However, despite s 273A(5) of  
51 the CEA, to withhold this information is inconsistent with the the  
52 general openness of the AEC's dealings.

53 I recognise, of course, that those policy reasons are not  
54 sufficient to suggest the original decision be varied and that  
55 there is no public interest test in the s 47 exemptions under the  
56 FOI Act. For that reason, other than as disclosed below, I do not  
57 rely on those policy reasons in seeking a review of the decision.

58 Schedule of documents

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60 The reasons at [24] state that disclosure of the schedule would  
61 "give general guidance to a person on how to uncover the trade  
62 secret protecting the EasyCount Software."

63 This is predicated on there being a protected trade secret in the  
64 EasyCount software. I will explain below why I do not believe that  
65 to be the case.

66 However, even if there is a trade secret which makes the software  
67 source code exempt, I do not believe the list of documents also  
68 attracts that exemption.

69 Mr Pirani relies on an exemption under s 26(2) of the FOI Act. This  
70 exemption applies where the schedule would be an exempt document.  
71 Given the wording at [24], the reasons clearly imply exemption is

72 claimed under s 47(1)(a) as the schedule would disclose a trade  
73 secret. However s 47(1)(a) requires disclosure of a trade secret;  
74 that it would "provide guidance ... on how to uncover [a] trade  
75 secret" is not sufficient. This type of material is perhaps more  
76 analogous to "know how" which is not protected.

77 To be protected the schedule must be itself of commercial value and  
78 confidential in nature. At most the schedule discloses the  
79 functionality and structure of the EasyCount software and its  
80 documentation. It does not disclose the way in which this  
81 functionality is implemented. This amounts merely to a statement of  
82 purpose, not to information which is of the type which receives the  
83 protection of confidentiality.

84 Furthermore that meta-data is already the subject of disclosure by  
85 the AEC. Manuals for Senate and fee-for-service election editions  
86 of EasyCount are listed on  
87 [http://www.aec.gov.au/about\\_aec/Publications/foi.htm](http://www.aec.gov.au/about_aec/Publications/foi.htm) as being  
88 available by FOI; this at least discloses their existence in the  
89 same way as the schedule would. Significant details about the  
90 structure and functionality of EasyCount are in the public domain,  
91 having been disclosed in the AEC's supplementary submission dated 7  
92 Feb 2003 to the JSCEM enquiry into the 2001 election (submission no  
93 181).

94 Even if some elements of the schedule would be exempt, certainly  
95 not all of the schedule is exempt. The names and nature of some  
96 documents have already been published. In those circumstances the  
97 AEC should provide at least an edited copy of the schedule under s  
98 22 of the FOI Act.

99 Trade secrets & commercially valuable information

100 -----

101 I accept the definition of trade secret given in DEWRSB v Staff  
102 Development and Training Company (2001) 114 FCR 301 and reiterated  
103 in the OAIC Guidelines on FOI required to be taken into account by  
104 s 93A of the FOI Act.

105 To be a trade secret, the information must be able to be put to  
106 advantageous use by someone involved in an identifiable trade  
107 (DEWRSB at [43]). The decision identified two areas of competition  
108 at [18]: industrial elections (under the Fair Work (Registered  
109 Organisations) Act) and fee for service elections.

110 My request was not for documents relating to those elections. My  
111 request was solely for documents relating to the senate count.  
112 Consistent with the reasons, this is not subject to any degree of  
113 competition.

114 The decision relies on the claim at [14] that the code base for  
115 EasyCount is shared between editions to such an extent that the fee  
116 for service versions are inseparable from the senate count  
117 versions. However, at [18](c) it is made clear that both industrial  
118 and fee for service elections have customised versions of  
119 EasyCount.

120 Furthermore the different counting mechanisms must form separate  
121 subroutines or functions within the computer code (if they did not,  
122 the counting method would be the same). As such those parts of the  
123 code are necessarily separable.

124 The decision clearly makes no attempt to provide an edited version  
125 of the documents under s 22 of the FOI Act. On the basis that the  
126 senate count functionality is separable, this is a clear error in  
127 law.

128 In addition, however, I contend that there is no trade secret even  
129 in the versions of EasyCount used for fee for service and  
130 industrial elections. In essence my position is that this material  
131 has no commercial value, or that the commercial value would not be  
132 diminished by its publication, or that the any advantage the AEC  
133 holds would not be diminished by publication. This is sufficient to  
134 deal with both claimed exemptions under s 47 of the FOI Act.

135 To explain my position it is necessary to differentiate the source  
136 code of a program (the instructions in a particular programming  
137 language) and the algorithm used by the program (the generic  
138 description of the way in which a result is achieved). Disclosure  
139 of the source code results in disclosure of the algorithm. However  
140 algorithms can be implemented in other languages once known.

141 As an example, the bubble sort algorithm is a well-known way of  
142 sorting a list of data. The algorithm is a way of doing things (an  
143 idea) which can be implemented in a range of programming languages.

144 The source code of computer programs is protected by the Copyright  
145 Act. The disclosure of source code under the FOI Act does not limit  
146 the applicability of copyright. Using or making copies of the  
147 source code, or creating an adaptation derived from the source  
148 code, would be an unlawful infringement of copyright.

149 On that basis no competitor could lawfully use any source code  
150 released under the FOI Act. For that reason the commercial value of  
151 the source code would be preserved and the advantage the AEC holds  
152 would not be diminished. For that reason the source code itself  
153 cannot constitute a trade secret or attract the protection of s  
154 47(1)(b).

155 Algorithms do not attract the protection of copyright. Therefore an  
156 algorithm could attract the protection of s 47(1). To the extent  
157 that these algorithms are trade secrets (or commercially valuable)  
158 the release of source code may result in their disclosure and a  
159 loss of commercial advantage.

160 In order for these to be capable of being trade secrets they must  
161 be confidential. The algorithms used by EasyCount are not  
162 confidential. The algorithms used for various forms of industrial  
163 elections are all specified at  
164 [http://www.aec.gov.au/About\\_AEC/AEC\\_Services/Industrial\\_Elections/voting.htm](http://www.aec.gov.au/About_AEC/AEC_Services/Industrial_Elections/voting.htm)  
165 with sufficient detail to re-implement them. The Senate and House  
166 of Representatives electoral count algorithms are described at  
167 <http://www.aec.gov.au/Voting/counting/index.htm> and in the  
168 Commonwealth Electoral Act.

169 Any system implemented in EasyCount which is not so described is  
170 likely described algorithmically elsewhere.

171 Any system algorithmically described could be reproduced easily by  
172 any programmer. In accordance with *Dais Studio Pty Ltd v Bullet  
173 Creative Pty Ltd* [2007] FCA 2054 at [77]-[80] this is a relevant  
174 consideration to whether the material is capable of being a trade  
175 secret. Where it is easily reproduced it is not capable of being a  
176 trade secret. This operates in addition to the fact that the  
177 algorithms are not confidential.

178 In particular, because the algorithms are already known, their  
179 disclosure by the AEC cannot result in a loss of commercial value.  
180 They have no commercial value because they are not secret.

181 The only algorithms which could constitute trade secrets are those  
182 which count votes in a unique way that has never otherwise been  
183 publicly disclosed. I accept that such an algorithm could  
184 constitute a trade secret to the extent it was used in industrial  
185 or fee-for-service elections. However, if the counting method is  
186 broadly known, for example having been disclosed to a wide range of  
187 electors, this would diminish the degree of protection available.

**Correspondence**

Internal Review Request

188 Identical arguments apply to the disclosure of information about  
189 data structures representing votes and documentation describing the  
190 operation of the software.

191 To the extent that any of this argument fails, relevant portions of  
192 the documents should be excluded and an edited version of the  
193 requested documents provided under s 22 of the FOI Act.

194 Should you wish for any clarification or to discuss this please do  
195 not hesitate to contact me by reply email.

196 Yours faithfully,

197 Michael Cordover