



ADMINISTRATIVE APPEALS TRIBUNAL OR SMALL TAXATION CLAIMS TRIBUNAL

APPLICATION FOR REVIEW OF DECISION

This form can be used to lodge an application to the Commonwealth Administrative Appeals Tribunal (AAT) or to the Small Taxation Claims Tribunal (STCT). Please read the attached information sheet before filling out this form.

APPLICANT

Title: Mr Ms Mrs Miss Other

Full name: First name: **Michael** Last name: **Cordova**

Gender: Male Female Date of birth: **29 July 1987**

Telephone (business): **03 6210 0069** Telephone (home): **0438 591 479 (preferred)**

Your address: **22 Powell Street
SANDY BAY TAS 7005**
Email: **foi@mjec.net (preferred)**

Your representative's name, address and telephone number (if you have one):
(If you have a representative, please put their name (with firm or company name, if any), address and telephone number in this box.)

Interpreter: Do you require the assistance of an Interpreter? Yes No
If yes, for which language?

Disability: If you have a disability and need assistance, please indicate whether:
Visual Hearing Wheelchair user
Other, please specify

DECISION

You do not have to answer this question if you can attach a copy of the decision. If you don't have a copy, please describe the decision briefly:

See attached

Date the decision was made

**25 June 2014 – FOI Act s 54W(b)
9 Dec 2013 – original decision**

Decision reference

LS4883 (AEC) and MR14/00056 (OAIC)

Date you received notice of the decision

25 June 2014

Who made the decision, if known:

Department or other body:
Australian Electoral Commission

Address:
**PO Box 6172, Kingston ACT 2604
West Block Offices, Queen Victoria Terrace, Parkes ACT 2600**

REASONS FOR APPLICATION

What are your reasons for seeking review of this decision? Please read the Information for Applicants sheet.

See attached

SMALL TAXATION CLAIMS TRIBUNAL (STCT) MATTERS

(only answer this question if you want a tax decision reviewed in the STCT)

Please read the Information for Applicants sheet for details about the STCT and the Taxation Appeals Division of the AAT before you answer.

Is the amount of tax in dispute less than \$5,000? Yes No

If yes, and you want your application dealt with in the STCT, please state the amount of tax in dispute.

\$.....

If the amount of tax in dispute is over \$5,000, or you do not state the amount of tax in dispute, your application will be dealt with in the Taxation Appeals Division of the AAT.

Signature

[Signature box]

Date

[Date box]

Reasons for AAT application

1. I am seeking review of the AEC's decision of 9 December 2013 enclosed.
2. I note for completeness that notwithstanding paragraph 3 of that decision, my request is specifically for the source code of the software in question (not the software, to the extent there is a difference). The full text of my request was:

"Part 1: source code for counting software

I am seeking source code for the software used to conduct the count of votes for a Senate election.

This request includes scripts or interpreted code used within another piece of software (for example, T-SQL scripts, stored procedures etc).

This request excludes software used for data entry or for interpretation of those scripts but includes data validation software if that is distinct from data entry software.

This request may encompass more than one piece of software and I seek source code for each.

Part 2: data specifications

I am seeking any documents which describe bespoke data formats used by any of the software sought in Part 1, either as input or output formats.

This request excludes any data formats which are human readable or for which published specifications are available (e.g. PDF).

For clarity, the types of documents I am seeking may include database table specifications, EBNF specifications for bespoke input data, column descriptors for CSV files, XML schemas or similar documents."

3. In my original request and following correspondence I did not express a preference for the format of the documents requested.
4. Given that the documents are computer code I would like them to be provided as digital copies in their original format. This is particularly important for documents described in part 1 of my request (the source code).
5. To the extent that edited copies of the source code are to be made available under s 22, I am content for the material merely to be deleted and not marked as such. This should permit documents to be provided in their original format with edited material deleted.
6. The AEC withheld the documents on the basis that they contained trade secrets (s 47(1)(a)) or other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed (s 47(1)(b)).
7. In particular the AEC claims that "[t]he algorithm is the trade secret" at [57] and [62] of the decision.

8. I dispute that disclosure of the documents would disclose a trade secret or commercially valuable information such as to make the documents exempt under s 47 of the FOI Act.
9. This matter was the subject of an IC Review that was closed under s 54W(b) of the FOI Act. Prior to closure the AEC identified that it may also rely on exemptions under ss 47E(b) or 47E(d) of the FOI Act.
10. I dispute that either s 47E conditional exemption applies. Further even if a conditional exemption applies I contend that providing access would not on balance be contrary to public interest.
11. I outline my broad contentions below. I will provide additional detail (including authority) in due course. Each contention is independent. Assumptions made for the purpose of one argument do not constitute admission of that assumption.

WIDE KNOWLEDGE OF THE ALGORITHM

12. The algorithm in question is that used for counting Senate votes. That algorithm is widely known and therefore cannot be a trade secret. In particular it is explained in some detail by the *Commonwealth Electoral Act*.

LACK OF COMMERCIAL VALUE

13. By the nature of vote-counting software, there is no commercial value in the algorithm used to count votes. There is no particular efficiency or advantage to be obtained. In this market the entire commercial value comes from other sources.
14. In any event, the algorithm by which votes are counted must be disclosed to those electors participating in the election.

DISCLOSURE WOULD NOT DIMINISH COMMERCIAL VALUE

15. Disclosure of the source code and algorithm would not eliminate the commercial value protected by copyright. The code could not be used by a competitor because the Commonwealth would retain copyright. As a result disclosure would not diminish the commercial value of the material, even if such value exists.

NO RELEVANT TEST, EXAMINATION OR AUDIT

16. There is no relevant test, examination or audit to be prejudicially affected under s 47E(b). In particular, Senate elections are not a test, examination or audit but rather a statutorily-prescribed activity of the AEC.

NO PREJUDICE TO A TEST, EXAMINATION OR AUDIT

17. Even if there is a test, examination or audit under s 47E(b), there is no prejudicial effect. In fact, given the importance of scrutiny in effectively conducting elections, the effect would be positive.

NO ADVERSE EFFECT ON AGENCY CONDUCT

18. The disclosure of source code would not have an adverse effect on the proper conduct of the agency.

PUBLIC INTEREST IN DISCLOSURE

19. Even if s 47E applies, the public interest is overwhelmingly in favour of the disclosure of the source code. The free and transparent operation of elections is of the highest public importance, as evidenced by the broad scrutiny provisions in the *Commonwealth Electoral Act* and statements made by the AEC.

EDITED VERSION

20. Even if an exemption applies to a part of the request, the nature of software is that it is modular. It must be possible to separate parts of the software which are used only for Senate counting, even if there are parts of the software shared with other counting systems. Those parts used for Senate counting are not used in any fee-for-service or industrial elections, therefore are not used by the AEC in a competitive market.
21. Even if particular algorithms or pieces of code are secret, there must be other parts of the software which are not. Not every one of the 360,000 lines of code can contain commercially valuable secrets.
22. As a result an edited version must be made available under s 22 of the FOI Act. This is reasonably simple to do. A person familiar with the code, working with or without the assistance of commonly available automated tools, could easily and quickly identify the relevant parts of the source code.
23. I could aid in this process were I provided with a list of documents. I could withdraw my request for documents clearly outside of scope.