



Our Ref: LS4849 ~ file 13/945

oMr Michael Cordover
By email to foi+request-435-87abdfce@righttoknow.org.au

Dear Mr Cordover

YOUR FOI REQUEST No. LS4849

The purpose of this letter is to give you a decision about access to documents that you requested under the *Freedom of Information Act 1982* (FOI Act).

SUMMARY

- 2 I, Paul Pirani, Chief Legal Officer of the Australian Electoral Commission (the 'AEC') am an officer authorised under section 23(1) of the FOI Act to make decisions in relation to FOI requests.
- 3 You requested access to documents relating to the EasyCount software (the 'Software') on 4 October 2013. Specifically you sought access to:
 1. software used to conduct the count of votes for a Senate election including scripts or interpreted code used within another piece of software (for example, data validation software that is not data entry software, T-SQL scripts, stored procedures etc) but excluding software used for data entry or for interpretation of those scripts; and
 2. documents that describe bespoke data formats used by any of the software sought in Part 1, either as input or output formats database table specifications, EBNF specifications for bespoke input data, column descriptors for CSV files, XML schemas or similar documents excluding any data formats which are human readable or for which published specifications are available (e.g. PDF).
- 4 I identified 58 documents that fell within the scope of your request. I did this by directing inquiries to the AEC's Elections Branch, Fee for Service Program and Industrial Elections Program as business owners of the Software and the AEC's Information Technology Branch which supports the operation of the Software.
- 5 I have decided not to provide you with a schedule listing the documents retrieved.

6 With regard to the documents you requested, I have decided to refuse access to the three documents. More information, including my reasons for my decision, is set out below.

DECISION AND REASONS FOR DECISION

Decision

7 With regard to the retrieved documents, I have decided to refuse access to all 58 documents under paragraph 47(1)(a) (exemption of a trade secret) or, in the alternative, paragraph 47(1)(b) (exemption of documents containing commercially valuable information) of the FOI Act

Material taken into account

8 I have taken the following material into account in making my decision:

- (a) the content of the documents that fall within the scope of your request
- (b) the *Commonwealth Electoral Act 1918* (the 'Electoral Act') (specifically sections 7A and 7B);
- (c) the FOI Act (specifically sections 26, 47 and 93A);
- (d) guidelines issued by the Information Commissioner under section 93A of the FOI Act (the 'Guidelines') (specifically paragraphs 5.1 to 5.34, 5.181 to 5.192 and 8.53);

Reasons

9 My reasons for refusing access and declining to provide you with a schedule of documents follow.

10 I decided that the requested documents are exempt from release under the FOI by reason of either of limbs of section 47 of the FOI Act, namely:

- (a) paragraph 47(1)(a) which exempts documents that disclose trade secrets; and
- (b) paragraph 47(1)(b) which exempts documents that contain any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.

11 Section 47 of the FOI provides:

47 Documents disclosing trade secrets or commercially valuable information

- (1) A document is an exempt document if its disclosure under this Act would disclose:
 - (a) trade secrets; or
 - (b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed.
- (2) Subsection (1) does not have effect in relation to a request by a person for access to a document:

- (a) by reason only of the inclusion in the document of information concerning that person in respect of his or her business or professional affairs; or
 - (b) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an undertaking where the person making the request is the proprietor of the undertaking or a person acting on behalf of the proprietor; or
 - (c) by reason only of the inclusion in the document of information concerning the business, commercial or financial affairs of an organisation where the person making the request is the organisation or a person acting on behalf of the organisation.
- (3) A reference in this section to an undertaking includes a reference to an undertaking that is carried on by, or by an authority of, the Commonwealth, Norfolk Island or a State or by a local government authority.

12 I found that your FOI Request does not trigger the carve out from exemption provided in subsection 47(2) because the requested documents do not relate to information about you.

13 I further found EasyCount is:

- (a) the AEC's proprietary software that is used for counting and distribution of preferences in:
 - (i) Senate elections
 - (ii) Industrial elections; and
 - (iii) Fee for service elections.
- (b) a program that allows computerised counting of ballots for a variety of different voting systems used by organisations. This program is continually reviewed and upgraded as organisations develop new voting systems. Easycount produces many detailed reports to assist Returning Officers and has further proved its value in assisting scrutineers to follow the complex counting process involved in some electoral systems.
- (c) was originally developed for use in industrial elections and was adapted for use in other fee for service elections and the Senate Count. EasyCount is used to conduct the count electronically by entering ballot paper data into the system.

14 I also found that the underlying code-base is shared between editions (eg. Senate, Fee-for-Service, etc) and is easily 'de-compilable' using publically available utilities. This means that a member of the public could gain access to, and leverage, AEC intellectual property stored in the source code for any EasyCount edition (ie. Senate, ICE, or SAEC).

15 The AEC has identified a number of competitors for the services provided using EasyCount (6 private sector and 8 State and Territory electoral commissions) which are listed with the competing services described in Annexure 1.

Trade Secret

16 A trade secret as information possessed by one trader which gives that trader an advantage over its competitors while the information remains generally unknown: see *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301.

17 I found that the requested documents contain information about a trade secret of the AEC for the following reasons:

18 The facts narrated at paragraphs 13 to 15;

- (a) Sections 7A and 7B of the *Commonwealth Electoral Act 1918* which authorise the AEC to enter into arrangements for the supply good and services to any person or body and charge reasonable fees for such supply.
- (b) The AEC has two programs whose business is to provide goods and services for reward to other persons and bodies, namely:

- (i) Industrial Elections Program

- Under the *Fair Work (Registered Organisations) Act 2009* (the Act), the AEC must conduct all elections for office in registered organisations unless an exemption has been granted by the Fair Work Australia. This includes all elections and amalgamation ballots for trade unions and employer organisations that are registered under the Act. These elections are usually conducted by means of postal voting, and a wide variety of electoral systems are used.

- (ii) Fee For Service Program

- The Fee for Service Program offers independent fee-for-service solutions for the election of committee members, office bearers and staff representatives. It also offers to conduct workplace agreement ballots, referendums, plebiscites and polls.

- (c) Both programs use a configuration of EasyCount as part of their business that has been customised to their business model (see also paragraph 13(b)).
- (d) EasyCount gives each Program an advantage over its competitors because of the efficiency it provides to the the allocation of preferences using diverse electoral systems by electronic means.
- (e) EasyCount has not been published by the AEC and is not itself available for sale.
- (f) Both Programs believe that disclosure of EasyCount to a competitor would be liable to cause real or significant harm to the business of the Program because it would allow competitors to offer to provide similar services at a lower cost than now offered. The reason for this belief is that the provision of this information would enable a competitor to provide commercial voting and counting services at a lower cost without the need the incur and recoup the development costs.
- (g) The investment made by the AEC in developing EasyCount is not easily qualified as the program is under regular review and enhancement.

- A further review of EasyCount is scheduled to be undertaken in 2014 to all documentation to ensure they are accurate, finalised and stored in an easily accessible location.

19 I believe that EasyCount is a trade secret for the reasons above. I believe that both the source code and the user manuals are part of the trade secret. Disclosure

of the manuals is could enable a technically literate person to devise a program that replicates the functionality of EasyCount. In all the circumstances it is appropriate to refuse access to EasyCount. On this basis I decided to refuse access to the retrieved documents.

Information having a commercial value

20 I found that the retrieved documents contain information of a commercial value to the AEC for the following reasons, namely the facts narrated at:

- (a) The facts narrated at paragraphs 13 to 15, and
- (b) The facts narrated at paragraphs 18(a) to 18(g).

21 I believe that EasyCount is information having a commercial value for the reasons above. As mentioned in paragraph 19, disclosure of the manuals is could enable a technically literate person to devise a program that replicates the functionality of EasyCount without having to bear the costs of developing the software and recoup the investment made by the AEC in that regard. In all the circumstances it is appropriate to refuse access to EasyCount.

Reason for not providing a schedule of documents

22 I had regard to paragraph 8.53 of the Guidelines which says:

8.53 The decision needs to clearly identify the documents considered by the decision maker for release (without disclosing exempt material if exemptions are claimed). Preparing a schedule of documents is often helpful in the decision making process. When the decision is made, the schedule (minus any exempt material considered during the process) can be attached to the statement of reasons.

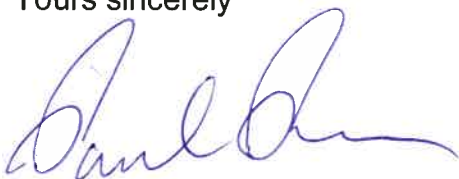
23 However, subsection 26(2) of the FOI Act provides:

26 Reasons and other particulars of decisions to be given

- (2) A notice under this section is not required to contain any matter that is of such a nature that its inclusion in a document of an agency would cause that document to be an exempt document.

24 I found that listing the documents in this notifying you of my decision would necessitate disclosing exempt material by reason that it would give general guidance to a person on how to uncover the trade secret protecting the EasyCount Software. I decided that it was inappropriate to provide a list of the retrieved documents.

Yours sincerely



Paul Pirani
Chief Legal Officer

4 November 2013

ANNEXURE 1.

COMPETITORS OF THE AEC IN OFFERING INDUSTRIAL ELECTION SERVICES OR FEE FOR SERVICE

NON GOVERNMENT

Above Quota Elections

contact@abovequota.com.au.

Offers a comprehensive provider of electoral services, offering (among other things) election management for organisations at all levels

See <http://www.abovequota.com.au/services/index.php>

Australian Electoral Company ABN 58 635 903 913

Unit 10, 18-20 Cessna Drive
Caboolture QLD 4510

<http://www.austelect.com/>

Australian Election Company offers highly secure, robust Electronic and/or paper-based Elections, Ballots and other Voting Services including sales of Ballot Boxes and Voting Screens.

- See <http://www.austelect.com/>

CorpVote Pty Ltd

Level 40, 140 William Street
Melbourne VIC 3000

<http://www.corpvote.com.au/>

Offers:

- Ballot & Election Technologies
- Workforce Voting
- Election Services
- Industry Awards Voting
- Community Engagement

See <http://www.corpvote.com.au/>

Everyone Counts Pty Ltd ('E1C')

Suite 1
207 Lygon St
Carlton VIC 3053

E1C runs on-line elections and has been used by the Australian Department of Defence and several Australian corporates and universities.

- See <http://www.osv.org.au/index.cgi?tid=45>

Scytl Secure Electronic Voting, S.A

Scytl's e-Election Platform provides a full end-to-end solution for secure electoral processes and voter management for political elections, referendums and eConsultations, universities, parliaments and assemblies, labor union elections, professional elections and shareholder meetings

Scytl, in partnership with HP, provided its electronic voting solution to the [State of Victoria \(Australia\)](#) for their parliamentary elections in November 2010.

- See <http://www.scytl.com/scytl/e-voting-technology-used-in-the-parliamentary-elections-of-the-state-of-victoria-australia/index.html>

TrueVote Pty Ltd

PO Box 865, North Adelaide
South Australia, 5006
ABN 32 155 079 280

<http://truevote.com.au/>

GOVERNMENT

New South Wales Electoral Commission

<http://www.elections.nsw.gov.au/>

Offers fee for service elections

- See <http://www.elections.nsw.gov.au/current-elections>

Victorian Electoral Commission

<https://www.vec.vic.gov.au/>

The VEC conducts Victorian State elections, local council elections, certain statutory elections, and commercial and community elections.

- See <https://www.vec.vic.gov.au/Current/default.html>

Electoral Commission of Queensland

<http://www.ecq.qld.gov.au/>

In addition to State General Elections, the Commission conducts State Referendums, Industrial Elections, and Local Government elections.

- See <http://www.ecq.qld.gov.au/elections.aspx?id=31>

Western Australian Electoral Commission

<http://www.elections.wa.gov.au/>

The Commission, under the [Industrial Relations Act 1979](#) and the [Electoral Act 1907](#), is also able to offer election services to a wide range of clients.

- See <http://www.elections.wa.gov.au/elections/other>

Electoral Commission of South Australia

<http://www.ecsa.sa.gov.au/>

Offers fee-for-service elections and ballots for statutory bodies and other organisations that require the appointment of an independent Returning Officer

- See <http://www.ecsa.sa.gov.au/elections/other-elections>

Tasmanian Electoral Commission

<http://tec.tas.gov.au/>

Offer other elections

- See <http://tec.tas.gov.au/pages/OtherElectionsMain.html>

Australian Capital Territory Electoral Commission

http://www.elections.act.gov.au/elections_and_voting/elections_for_organisations

Elections ACT conducts elections and provides other electoral services for organisations under its power to provide services for determined fees in section 7(1)(g) of the [Electoral Act 1992](#)

- See http://www.elections.act.gov.au/elections_and_voting/elections_for_organisations

NT Electoral Commission

<http://www.ntec.nt.gov.au/Pages/default.aspx>

Offers Fee for Service Elections

See: <http://www.ntec.nt.gov.au/ElectionsAndReferendums/FeeForServiceElections/Pages/default.aspx>