



Our Ref: LS4883 ~ file 13/945

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

Dear Mr Cordover

LS4883 OUTCOME OF INTERNAL REVIEW OF THE DECISION TO REFUSE YOUR FOI REQUEST No. LS4849

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

SUMMARY

- 2 I, Tom Rogers, Deputy Electoral Commissioner 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 You were advised on 4 November 2013 of the decision by Mr Paul Pirani, Chief Legal Officer to refuse access to any of the 58 documents that you requested. You asked for internal review of that decision on 8 November 2013.

- 5 Your email of 8 November 2013 3:52 PM to the AEC's INFO mailbox in which you requested the internal review also set out the contentions that you made in relation to the decision to refuse you access to the documents.
- 6 In reviewing our earlier decision, I identified 56 documents that fell within the scope of your request. Two other documents mentioned in your email of 8 November 2013 3:52 PM AM were also retrieved but, as I explain below, they are technically out of 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.
- 7 I have decided not to provide you with a schedule listing the relevant documents retrieved. However, the schedule attached as Attachment A provides a description of the two documents mentioned in your contention that for technical reasons fall outside the scope of your request and indicates those reasons which I explain below.
- 8 With regard to the documents you requested, I have decided to refuse access to the 56 documents. More information, including my reasons for my decision, is set out below.

DECISION AND REASONS FOR DECISION

Decision

- 9 With regard to the retrieved documents, I have decided to refuse access to all 56 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. I have also decided that Document Nos. 1 and 2 listed in the schedule in Attachment A are out of scope of your request.

Material taken into account

- 10 I have taken the following material into account in making my decision:
- (a) the contentions made in your email of 8 November 2013 3:52 PM ('Your Contentions');
 - (b) the content of the documents that fall within the scope of your request;
 - (c) the content of the documents mentioned in Your Contentions that fell outside the scope of your request;
 - (d) the *Commonwealth Electoral Act 1918* (the 'Electoral Act') (specifically sections 7A and 7B);
 - (e) the FOI Act (specifically sections 26, 47 and 93A);

- (f) 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);
- (g) Australian Government Metadata Standard Version 2.0 published by the National Archives at http://www.naa.gov.au/Images/AGRkMS_Final%20Edit_16%2007%2008_Revised_tcm16-47131.pdf (the 'AGMS');
- (h) The AEC webpage *Industrial Elections Voting Systems* at http://www.aec.gov.au/About_AEC/AEC_Services/Industrial_Elections/voting.htm (the 'Industrial Elections webpage');
- (i) The AEC webpage *Counting the votes* at <http://www.aec.gov.au/Voting/counting/index.htm> (the 'Counting the Votes webpage');
- (j) The Macquarie Concise Dictionary 4th Edition; and
- (k) The reasons for decision in the following judgments:
 - (i) *Dais Studio Pty Ltd v Bullet Creative Pty Ltd* [2007] FCA 2054 (the 'Dais Studio Case')
 - (ii) *Department of Employment, Workplace Relations and Small Business v Staff Development and Training Company* (2001) 114 FCR 301 (the 'DEWRSB Case');
 - (iii) *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 (the 'Lansing Linde Case') (to the extent that was quoted in Searle' Case);
 - (iv) *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Anor* (1992) 108 ALR 163 ('Searle's Case')

Reasons

- 11 My reasons for refusing access and declining to provide you with a schedule of relevant documents and deciding that two documents were out of scope of your request follow.
- 12 I decided that the requested documents are exempt from release under the FOI by reason of either limb 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.

13 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.

14 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.

15 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) leased by the AEC to other electoral bodies.

- (i) In 2005 the South Australian Electoral Commission leased it for the 2006 and 2010 State elections.
 - (ii) In 2008 the Northern Territory Electoral Commission leased it for the NT Shire elections for each electoral event occurring prior to the 2012 NT Shire elections; and
 - (iii) Negotiations are underway about the SA Electoral Commission leasing the EasyCount Software for the SA Legislative Council elections in 2014.
- (d) Negotiations are underway about the SA Electoral Commission leasing the EasyCount Software for the SA Legislative Council elections in 2014 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.
- (e) used in deriving the revenue from both Programs.

16 I also found that the underlying code-base is shared between editions (eg. Senate, Fee-for-Service, etc) and is easily 'de-compileable' 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).

17 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 Attachment B.

Your Contentions

18 I took account that you made three principal contention in support of release of the documents, namely:

- (a) Release should occur as a matter of policy;
- (b) A critique of the schedule of documents (Annexure 1 to the letter notifying a decision dated 4 November 2013 from Mr Pirani); and
- (c) A critique about trade secrets and commercially valuable information.

Release as a matter of policy

(a) EasyCount Senate User Guide

19 I note that in Your Contentions that you make contentions about the significance of the AEC's list of documents in its 'AEC s 9 FOI statement (http://www.aec.gov.au/about_aec/Publications/foi.htm)'.

20 The reference to a Section 9 Statement refers to a statement published by the AEC under section 9 of the FOI Act (the 'Old Section 9') as it stood

before its repeal and substitution of a new section 9 by the *Freedom of Information Amendment (Reform) Act 2010* which enacted the Information Publishing Scheme.

21 In so far as is material, the Old Section 9 provided:

- (2) The principal officer of an agency shall:
 - (a) cause copies of all documents to which this section applies in respect of the agency that are in use from time to time to be made available for inspection and for purchase by members of the public;
 - (b) cause to be prepared by a day not later than the relevant day in relation to the agency, and as soon as practicable after preparation to be made available, for inspection and for purchase by members of the public, at each Information Access Office, a statement (which may take the form of an index) specifying the documents of which copies are, at the time of preparation of the statement, available in accordance with paragraph (a) and the place or places where copies may be inspected and may be purchased; and
 - (c) cause to be prepared within 3 months, if practicable, and in any case not later than 12 months, after the preparation of the last preceding statement prepared in accordance with paragraph (b) or this paragraph, and as soon as practicable after preparation to be made available, for inspection and for purchase by members of the public, at each Information Access Office, a statement bringing up to date the information contained in that last preceding statement.

22 You wrongly assert that the AEC Section 9 FOI Statement (http://www.aec.gov.au/about_aec/Publications/foi.htm) provides that the EasyCount Senate User Guide (Document Nos. 1 and 2) is available under FOI and does not indicate that it would be exempt or partially exempt.

23 Documents listed in the Section 9 Statement are documents made available for purchase by the public in accordance with arrangements made by an agency (namely the AEC) for the purposes of paragraph 12(1)(c) of the FOI Act. Paragraph 12(1)(c) of the FOI Act excludes such documents from release under Part III of the FOI Act (which authorises FOI Requests).

24 Paragraph 12(1)(c) of the FOI Act (which is in Part III of the FOI Act) provides:

12 Part not to apply to certain documents

- (1) A person is not entitled to obtain access under this Part to:

...

- (c) a document that is available for purchase by the public in accordance with arrangements made by an agency.

25 It follows that as a matter of law versions of the EasyCount Senate User Guide are out of scope of your request.

(b) Supplementary submission No. 181 to JSCEM inquiry into the 2001 election

26 Your Contentions refer to the AEC's supplementary submission (number 181, dated 7 February 2003) to the JSCEM inquiry into the 2001 Federal Election (the 'Supplementary Submission') and quote from paragraph 8.12 the following:

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

27 I take it that this is done to support your contention that confidence in the electoral system can only exist where the system is transparent.

28 The context for the quote is found in paragraph 8.9 of the Supplementary Submission which says:

8.9 Development of the new EasyCount system is being undertaken by the AEC's own programmers, who are engaged as part of an IT consultancy contract. The 'Trusted Computing' standard, ISO 15408, is not being used in the AEC.³⁹ EasyCount is being developed to meet the Standard ISO 9126 'Software engineering - Product quality'. This is a rigorous Quality Assurance standard. Also, the AEC plans to have EasyCount independently verified, as well as have code available for inspection by stakeholders.

29 Footnote 39 in the Supplementary Submission says:

39 The AEC will examine ISO 15408 to consider the value of using it for future AEC software systems.

30 The last sentence of paragraph 8.9 of the Supplementary Submission makes it clear that the code was offered for review to stakeholders only, namely the political parties. This is supported by paragraph 8.11 of the Supplementary Submission which indicates that its forerunner, CSSS was offered for review but that no political party accepted the invitation.

31 In the first sentence of paragraph 8.12 of the Supplementary Submission (quoted in Your Contentions) the word 'implications' has a footnote reference to footnote 41. Footnote 41 says:

41 For security reasons, EasyCount will operate on standalone machines, which will prevent hacking.

32 This indicates a need to safeguard EasyCount Software from electronic attack to subvert its functionality. Disclosure of the source code would assist such an attack.

33 When seen in context, the quotation from the Supplementary Submission does not support your contention. In any case you concede that this is so in the last paragraph of this section of the contentions where you say:

I recognise, of course, that those policy reasons are not sufficient to suggest the original decision be varied and that there is no public interest test in the s 47 exemptions under the FOI Act. For that reason, other than as disclosed

below, I do not rely on those policy reasons in seeking a review of the decision.

Your critique of the schedule of documents

(a) Know how argument

34 I noted that you took issue with the characterisation of the *EasyCount Software* as a trade secret. You argue that the software is more analogous to "know how" which you assert is not protected.

35 There is a distinction between know how which is an unavoidable acquisition of skills by person who deal with a process and an algorithm (which is kept secret) that the person uses. The algorithm for counting votes is expressed in the source code. An individual may use the EasyCount Software without knowing the algorithm upon which it depends. Likewise, there is a difference between the acquisition of a skill and the resort to a detailed manual necessary to support the effective exercise of the skill.

36 It follows that I did not accept your know how argument.

(b) The supporting documents argument

37 You argue that documents (as distinct from the source code) listed in the Schedule do not attract exemption. In this regard you assert:

Mr Pirani relies on an exemption under s 26(2) of the FOI Act. This exemption applies where the schedule would be an exempt document. Given the wording at [24], the reasons clearly imply exemption is claimed under s 47(1)(a) as the schedule would disclose a trade secret. However s 47(1)(a) requires disclosure of a trade secret; that it would "provide guidance ... on how to uncover [a] trade secret" is not sufficient. This type of material is perhaps more analogous to "know how" which is not protected.

38 I disagree with the final sentence of your argument. As remarked above, what is a trade secret is a question of fact. Anything that would impair the secret if published is part of the secret so long as it is unpublished.

39 The supporting documents for which exemption is claimed are believed the AEC to provide information that would allow the algorithm to be deduced.

40 It follows that I did not accept your supporting documents argument.

(c) the lack of commercial value argument

41 You argue:

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

42 Your argument is puzzling. The schedule that you speaks of must be the schedule that was Annexure 1 of Mr Pirani's letter of 4 November 2013 notifying you of his decision. It is a nonsense to suggest that that schedule needs to have a commercial value. However, it makes sense if I read your reference to the 'schedule' as a reference to the documents listed in the schedule. I so read the reference.

43 The Court in Searle's Case cited with approval the following observations by Staughton LJ in *Lansing Linde Ltd v Kerr* (1990) 21 IPR 529 (the 'Lansing Linde Case') at p 536:

It appears to me that the problem is one of definition: what are trade secrets, and how do they differ (if at all) from confidential information? Mr Poulton suggested that a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.

...

But some may say that not all such information is a trade secret in ordinary parlance. If that view be adopted, the class of information which can justify a restriction is wider, and extends to some confidential information which would not ordinarily be called a trade secret.

44 It is trite to observe that the commercial value of the documents listed in that schedule (Annexure 1 to Mr Pirani's letter of 4 November 2013 is derived from the commercial value of the EasyCount Software. As indicated by the decision in the Lansing Linde Case it is appropriate to include in the ambit of a trade secret documents that constitute confidential information.

45 To the extent that the documents listed in the schedule have not been published or offered for purchase by the public, they are confidential and remain confidential so long as they remain unpublished. Their status as being confidential arises from their association with the trade secret in the EasyCount Software. As remarked elsewhere those documents that are offered for purchase are as a matter of law are out of scope of the FOI Request.

46 It follows that your assertion is unsustainable.

(d) *The meta data argument*

47 You argue:

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

48 Metadata is defined by the National Archives of Australia in the following terms:

The Australian Standard on Records Management, AS ISO 15489, defines recordkeeping metadata as:

Data describing context, content and structure of records and their management through time.¹

The National Archives of Australia further defines recordkeeping metadata as:

Structured or semi-structured information that enables the creation, management and use of records through time and across domains. Recordkeeping metadata can be used to identify, authenticate and contextualise records and the people, processes and systems that create, manage, maintain and use them.²

See the Australian Government Metadata Standard Version 2.0 published by the National Archives at http://www.naa.gov.au/Images/AGRkMS_Final%20Edit_16%2007%2008_Revised_tcm16-47131.pdf.

49 The foot notes cited in paragraph 48 say:

1 AS ISO 15489.1:2002, 'Records Management – Part 1: General'.

2 Definition adapted from D Wallace, 'Archiving Metadata Forum: Report from the Recordkeeping Metadata Working Meeting, June 2000', *Archival Science*, vol. 1, no. 3, 2001.

50 I took you to be referring to documents listed in the Section 9 Statement. The documents listed in the 'Section 9 Statement' as explained at paragraph 23 are as a matter of law out of scope of an FOI Request.

51 These documents are not metadata about the EasyCount Software but primary documents in their own right.

52 I found that they do not disclose the algorithm that is expressed in the EasyCount Software source code.

53 Accordingly, I reject your contention about the significance of the metadata.

Trade Secrets and commercially valuable information

54 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.

55 You contested the finding by Mr Pirani in the original decision that the EasyCount Software was a trade secret. In doing so you made the following contentions:

- (A) You sought to 'distinguish' the Senate EasyCount Software as being separate from the EasyCount Software used for fee for service and industrial elections;
- (B) You specifically contended that there is no trade secret in the EasyCount Software;
- (C) You further contended that the documents relating to the EasyCount Software were not capable of being confidential documents;
- (D) You contended that the algorithm in the source code of the EasyCount Software had been published and was in the public domain.

(A) *Your contention that Senate EasyCount Software is separate from other versions of EasyCount Software used in fee for service or industrial elections*

56 I note that Your Contentions say:

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

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

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

57 The issue is whether the algorithm expressed in the source code for the Senate EasyCount Software is the same algorithm that is expressed in the source code for the other versions of the EasyCount Software. The algorithm is the trade secret.

58 I found that:

- (a) for the reasons given at paragraph 16, the same algorithm is expressed in the source code for all versions of the EasyCount Software;
- (b) disclosure of any version of the source code must necessarily publish the algorithm and thereby destroy the trade secret. Accordingly I rejected this contention.

(B) *Your contention that there is no trade secret*

59 In Your Contentions you say:

In addition, however, I contend that there is no trade secret even in the versions of EasyCount used for fee for service and industrial elections. In essence my position is that this material has no commercial value, or that the commercial value would not be diminished by its publication, or that the

any advantage the AEC holds would not be diminished by publication. This is sufficient to deal with both claimed exemptions under s 47 of the FOI Act.

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

...

In order for these to be capable of being trade secrets they must be confidential. The algorithms used by EasyCount are not confidential. The algorithms used for various forms of industrial elections are all specified at http://www.aec.gov.au/About_AEC/AEC_Services/Industrial_Elections/voting.htm with sufficient detail to re-implement them. The Senate and House of Representatives electoral count algorithms are described at <http://www.aec.gov.au/Voting/counting/index.htm> and in the Commonwealth Electoral Act.

(C) Confidentiality of trade secrets

60 In my view Your Contention wrongly seeks to conflate the secret (something which is confidential) with the doctrine of enforceable obligations to keep information confidential.

61 In considering your contention I turned my mind to the following matters:

- (a) For the purposes of determining whether there is a trade secret confidentiality is a fact that needs to be established to show that there is a secret: see my remarks at paragraphs 43 and 54.
- (b) The quality of the secret as a trade secret depends on its importance in trade and commerce to the owner and the adverse consequence for the owner if the secret is disclosed: see the Lansing Linde Case discussed at paragraph 43.

(D) Publication of the algorithm

62 The critical test is that the secret has not been published – as is the case with the EasyCount Software. Its existence is known but the Software remains unpublished. In the case at hand, we are considering whether the algorithm in the source code has been published.

63 I do not agree with your description of an algorithm as a generic description of the way in which a result is achieved.

64 The Macquarie Concise Dictionary 4th Edition defines 'algorithm' as follows:

Algorithm /'ælgəɪdəm/ *n.* an effective procedure for solving a particular mathematical problem in a finite number of steps.

65 The AEC webpage *Industrial Elections Voting Systems* at http://www.aec.gov.au/About_AEC/AEC_Services/Industrial_Elections/voting

[.htm](#) (the 'Industrial Elections webpage') that you cite describes voting systems and is not itself an algorithm. At best it is the drafting instructions that the drafter of the algorithm would have regards to in preparing an effective procedure to express the voting process as a mathematical problem for the purposes of a computer program that would produce the outcomes required by the Industrial Elections webpage.

66 The source code gives effect to the algorithm in the EasyCount Software and is thus an expression of the algorithm in a programming language.

67 The second paragraph of Your Contentions quoted in paragraph 59 concedes that disclosure of the source code discloses the algorithm!

68 I found that the algorithm and the source code of the EasyCount Software that expresses it have been kept confidential by the AEC and are not in the public domain.

Distinguishing the judgment in Dais Studio Pty Ltd v Bullet Creative Pty Ltd [2007] FCA 2054

1.1 In the fifth paragraph of Your Contentions you cite the judgment in [Dais Studio Pty Ltd v Bullet Creative Pty Ltd \[2007\] FCA 2054](#) (the 'Dais Studio Case') as authority to support your contentions.

69 The Dais Studio Case was about whether information acquired by employee was "confidential information" or "proprietary information" in circumstances where they were using information embedded in a web tool sold by Dais Studio Pty Ltd. to its customers, namely a "content management system" ("CMS").

70 The Court found that:

- (a) CMS is a system of files (resident on the server) that enables the owner of the web site to undertake online editing of the content, and therefore of the appearance, of the site; and
- (b) There are many CMSs publicly, freely and legally available on the Internet that a web developer may use if they desired to incorporate a CMS into a web site being built.

71 The Court concluded that in these circumstances that the CMS files lacked any element of confidentiality about them by reason of the difficulty or expense associated with re-creating them or something similar and so refused to restrain the former employees from developing other CMS programs.

72 This is not the case with EasyCount Software because:

- (a) there are no commonly available alternative software programs that have been published;

- (b) unlike the Dais Studio Case the situation here does not involve a use being made by an employee of information gained during their employment but does involve the access to information that is secret sought by a third party, namely you.

73 It follows that the Dais Studio Case does not apply to your FOI Request.

The provision of an edited version contention

74 As regards the contention that it should be possible to edit the source code under section 22 of the FOI Act, I do not see how that is feasible. The extent of editing necessary to protect the algorithm would be so extensive that it would be tantamount to a refusal to release the document in any case.

75 Subsection 22(1) of the FOI Act provides:

22 Access to edited copies with exempt or irrelevant matter deleted

Scope

(1) This section applies if:

(a) an agency or Minister decides:

- (i) to refuse to give access to an exempt document; or
- (ii) that to give access to a document would disclose information that would reasonably be regarded as irrelevant to the request for access; and

(b) it is possible for the agency or Minister to prepare a copy (an edited copy) of the document, modified by deletions, ensuring that:

- (i) access to the edited copy would be required to be given under section 11A (access to documents on request); and
- (ii) the edited copy would not disclose any information that would reasonably be regarded as irrelevant to the request; and

(c) it is reasonably practicable for the agency or Minister to prepare the edited copy, having regard to:

- (i) the nature and extent of the modification; and
- (ii) the resources available to modify the document; and

(d) it is not apparent (from the request or from consultation with the applicant) that the applicant would decline access to the edited copy.

76 Paragraph 5.3 of the OAIC Guidelines say:

5.3 A 'document' includes any part of a document that is relevant to the terms of the FOI request. Consequently, a decision maker should consider whether it is practicable to delete exempt material and provide the balance

to the applicant. If it is practicable to delete the exempt material and retain a copy of a meaningful non-exempt edited copy to provide to the applicant, an agency or minister must do so (s 22).

77 It follows for the reasons explained at paragraph 74 that section 22 does not apply to the FOI Request as a result of the failure to meet the test for its application in paragraph 74.

My findings

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

- (a) The facts narrated at paragraphs 15 to 17;
- (b) I rejected your contentions for the reasons explained at paragraphs 59 to 61;
- (c) 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.
- (d) 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.
- (e) Both Programs use a configuration of EasyCount as part of their business that has been customised to their business model (see also paragraph 15(b)).
- (f) 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.
- (g) EasyCount has not been published by the AEC and is not itself available for sale.

- (h) 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 to incur and recoup the development costs.
- (i) 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.

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

80 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 15 to 17, and
- (b) The facts narrated at paragraphs 78(c) to 78(i).

81 I found that EasyCount is information having a commercial value for the reasons above. As mentioned in paragraph 79, 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

82 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.

83 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.

84 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.

YOUR REVIEW RIGHTS

85 If you are dissatisfied with my decision, you may apply to the Australian Information Commissioner for review. An application for review by the Information Commissioner must be made in writing within 60 days of the date of this letter, and be lodged in one of the following ways:

online: <https://forms.australia.gov.au/forms/oaic/foi-review/>
email: enquiries@oaic.gov.au
post: GPO Box 2999, Canberra ACT 2601
in person: Level 3, 175 Pitt Street, Sydney NSW

86 More information about Information Commissioner review is available on the Office of the Australian Information Commissioner website. Go to www.oaic.gov.au/foi-portal/review_complaints.html#foi_merit_reviews.

QUESTIONS ABOUT THIS DECISION

87 If you wish to discuss this decision, please contact:

Owen Jones
Senior Lawyer
Telephone: 02 6271 4528
Email: owen.jones@aec.gov.au

Yours sincerely



Tom Rogers
Deputy Electoral Commissioner

9 December 2013

LS4849 SCHEDULE OF RELEVANT DOCUMENTS

Request for:

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).

Document	Description	Date	Recommendation/Decision
1	User Guide - EasyCount Senate (Final, June 2010) [Elections Branch].		<p>Document No. 1 was listed for purchase by the public under the Old Section 9 of the FOI Act that applied until repealed and a new section 9 was substituted by the <i>Freedom of Information Amendment (Reform) Act 2010</i> as part of the provision of the Information Publishing Scheme. Consequently paragraph 12(1)(c) of the FOI Act excludes it from release under Part III the FOI Act. It is out of scope of the FOI request as a matter of law.</p> <hr/> <p>I find that Document No. 1 is available for purchase by the public under arrangements made by the AEC and I decide that Document No. 1 is out of scope of the FOI Requests for the</p>

			<p>reasons discussed at paragraphs 54 to 79.</p>
<p>2</p>	<p>EasyCount Senate User Guide (2013)</p>		<p>The precedent set in relation to Document No. 1 to offer the document for purchase by the public applies to Document No. 2. It follows that you may find that Document No 2 is also offered for purchase by the public. Consequently paragraph 12(1)(c) of the FOI Act excludes it from release under Part III the FOI Act. It is out of scope of the FOI request as a matter of law.</p> <hr/> <p>I find that Document No. 2 is offered for purchase by the public and I decide that Document No. 2 is out of scope of the FOI Requests for the reasons discussed at paragraphs 54 to 79.</p>

**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/scytls-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>.