

## Revised Reasons – Freedom of Information Request No. LEX3110

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### Authority

As a Manager, Corporate and Information Law, Legal and Procurement Branch, I am an authorised decision-maker under section 23 of the FOI Act.

### Retrieval process

To identify documents for your request, I arranged for relevant staff likely to be able identify documents to undertake a comprehensive search of the relevant electronic holdings used by the AEC. The outcome of that search was the Relevant Document identified in my revised decision was the only document that was within the scope of your FOI Request.

### Material taken into account

- (a) the content of the documents that fall within the scope of your FOI Request (i.e., the Relevant Document);
- (b) the [Commonwealth Electoral Act 1918](#) (the 'Electoral Act')
- (c) the [Freedom of Information Act 1982](#) (the 'FOI Act'), specifically section 47E;
- (d) the guidelines ('[FOI Guidelines](#)') issued by the Australian Information Commissioner under section 93A of the FOI Act;
- (e) the [FOI Guidance Notes](#), July 2011 issued by the Department of Prime Minister and Cabinet; and
- (f) the [Privacy Act 1988](#).

### Reasons

#### ***Conditional exemption***

The functions of the AEC include the conduct of elections, requiring the AEC to maintain an impartial and independent electoral system that is safe from interference including cyber-attack and disinformation campaigns. Part of doing so includes to conducting audits into the

electoral system processes and procedures to ensure their efficacy and protection from such interference.

Section 47E of the FOI Act conditionally exempts a document if its disclosure would reasonably be expected to affect certain operations of agencies on one or more of the following grounds

- (a) prejudice to the effectiveness of procedures or methods for the conduct of tests, examinations, or audits;
- (b) prejudice to the attainment of the objects of particular tests, examinations, or audits;
- (c) a substantial adverse effect on the management or assessment of personnel; or
- (d) a substantial adverse effect on the proper and efficient conduct of operations.

Paragraph 47E(b) of the FOI Act provides that a document is conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the effectiveness of procedures or methods for the conduct of tests, examinations, or audits by an agency. Part of the environment within which the EasyCount Software ('ECS') and Ballot Paper Reconciliation System ('BPRS') operate are the measures applied to prevent successful interference, including cyber-attacks and to detect cyber-attacks on those systems. Further knowledge of the environment within which the ECS and BPRS operates risks attacks to undermine the reliability of the testing of those systems.

It follows that disclosing information contained in certain parts of the Relevant Document could reasonably be expected to have a detrimental effect on the conduct of future elections.

Paragraph 47E(d) of the FOI Act provides that a document is conditionally exempt if disclosure would, or could reasonably be expected to, have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.

The AEC experienced increased disinformation regarding the electoral process during the 2019 and 2022 federal election. Having the information to which the conditional exemption has been applied widely available, may result in people misusing information in relation to processes undertaken by the AEC to review the integrity of electoral operations, including Senate counting procedures to interfere with those operations during, or in the preparation for, an election.

The conduct of elections by the AEC in the correct manner to produce reliable outcomes regarding the election of Senators and Members of the House of Representatives is a central to the intent of Australian Democracy. Any successful interference with the ECS and BPRS could produce an unreliable outcome of those elections necessitating the conduct of a new election and/or significant disruption to the preparation of an election, and mistrust in the outcome.

## ***Findings***

I found that:

- (a) the conditional exemption provided by paragraph 47E(b) of the FOI Act; and
- (b) the conditional exemption provided by paragraph 47E(d) of the FOI Act, applied to the Relevant Document.

I made these findings because I was satisfied that the Relevant Document:

- (a) related to the processes by which the efficacy of changes made to the algorithm for the ECS and miscellaneous defect fixes to ECS was tested to give the AEC assurance over the integration of ECS with the Ballot Paper Reconciliation System BPRS; and
- (b) disclosure of the Relevant Document would facilitate interference with the ECS or the BPRS causing a disruption in the conduct or preparation of federal election events.

## ***Decision about conditional exemption***

It followed from my findings that the Relevant Document is conditionally exempt under section 47E of the FOI Act and that the AEC is obliged by subsection 11A(5) of the FOI Act to give access to that document unless (in the circumstances) access to the document at this time would, on balance, be contrary to the public interest.

## ***Weighing the public interest for and against access***

In weighing the competing public interest that apply to access to the Relevant Document I considered the factors favouring access specified in subsection 11B(3) of the FOI Act as well as the factors against access discussed above. I also disregarded the irrelevant factors forbidden by subsection 11B(4) of the FOI Act. In doing this I had regard to paragraphs 6.7 – 6.28 and 6.95 – 6.123 of the FOI Guidelines.

In particular, I considered the following factors favouring access:

- (a) promote the objects of the Act

Giving access to the Relevant Document would contribute to assuring the public that Commonwealth elections produce an accurate count of the ballots cast from which the identity of successful candidates for election as Senators and Members of the House of Representatives.

The importance of these elections is that the Government of the day is formed from those Senators and Members of the House of Representatives.

- (b) inform debate on a matter of public importance

Access to the Relevant Document could inform public submissions made to the inquiry into the 2022 Federal Election by the Joint Standing Committee on Electoral Matters that is now underway.

- (c) promote effective oversight of public expenditure

Access to the Relevant Document indirectly contributes to the oversight of public expenditure to the extent that it demonstrates that the efficacy of the ECS or the BPRS which lays the foundation for establishing that those systems represent value for money obtained by the AEC.

I also considered that the public interest would be sufficiently vindicated by having access to the edited copy of the Relevant Document with the minimal redactions.

Upon balancing all of the above relevant public interest considerations, I was satisfied that the factors against access outweighed the factors for access because the public interest in achieving reliable outcomes for elections, the heightened risk of interference and avoiding the cost and trouble of repeat elections outweighed the public interest in full access the Relevant Document.

### ***Decision about exemption***

I have concluded that the disclosure of the conditionally exempt information in the document would be contrary to the public interest, and it is therefore exempt from disclosure under the FOI Act.

### ***Application of section 22 of the FOI Act***

I next considered the application of section 22 of the FOI Act to the decision that the Relevant Document is exempt.

Section 22 of the FOI Act requires an agency (i.e., the AEC) to prepare an edited copy of an exempt document from which is redacted exempt or irrelevant material where:

- (a) it is possible for the agency to prepare such a copy;
- (b) it is reasonably practicable for the agency or Minister to prepare that copy; and
- (c) it is not that the applicant would decline access to that copy.

I had regard to paragraphs 3.95 – 3.100 of the FOI Guidelines when determining the feasibility of preparing an edited copy of the Relevant Document.

I found that it was both possible and reasonably practicable for the AEC to prepare an edited copy of the Relevant Document from which was redacted the exempt matter, being the matter that was contrary to the public interest to give access under section 47E.

I also found that it was not apparent that you would decline access to that document.

Accordingly, I directed the preparation of such an edited copy to which you should be given access.

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End of Attachment B