

LEX418

Vanessa Teague  
By email: [foi+request-7394-4c4bb7a0@righttoknow.org.au](mailto:foi+request-7394-4c4bb7a0@righttoknow.org.au)

Dear Ms Teague

### **Freedom of Information request - Senate Counting Arrangements**

I refer to your request dated 8 June 2021 for access to documents under the *Freedom of Information Act 1982 (FOI Act)*, as revised on 13 July 2021. Your request is for:

... documents (excluding source code) dated 2016, 2017 or 2018 which are procurement and contracting documents relating to the engagement of information and communication contractors and contract staff to undertake projects relating to the development of the EasyCount software (i.e. a(iii) in your letter).

### **Background**

On 8 June 2021, you requested access to:

... based on the released email dated Friday October 12, 2018, which states that the ScytI contract was not used because "there was another suitable arrangement used for this purpose."

I request, under the Freedom of Information Act, all documents related to this other "suitable arrangement" for the Senate Counting Solution.

On that date, you notified the Australian Electoral Commission (**AEC**) that you agreed to exclude from scope the names and signatures of particular individuals and, in separate correspondence, that you were seeking access to 'all documents related to this solution' and not the source code.

On 16 June 2021, the AEC provided you with a notice to advise you of an intention to refuse access to documents in accordance with your request on the grounds that a practical refusal reason existed under s 24AA of the FOI Act and invited you to narrow the scope of your request.

On 18 June 2021, you responded advising you request documents (excluding source code) dated 2016, 2017 or 2018 which:

- relate to the development of the EasyCount software, other than the source code
- are procurement and contracting documents relating to the engagement of information and communication contractors and contract staff to undertake projects relating to the development of the EasyCount software

- are authored by external software testing consultants engaged to independently validate and verify the Senate Counting Solution.

On 28 June 2021, the AEC provided a further notice of intention to refuse access to documents on the grounds that a practical refusal reason existed and invited you to further revise the scope of your request.

On 13 July 2021, you further narrowed the scope of your request, as set out above.

On 20 July 2021, you were asked if you agreed to exclude from the scope of your request the names, signatures or handwritten initials and contact details of AEC staff, contractors and contract staff. On that date, you agreed to exclude this information from the scope of your request.

In accordance with s 24AB(8) of the FOI Act, the consultation periods between you being given notice of the intention to refuse your request and your responses do not count toward the 30 day statutory timeframe for providing you with a decision on your request and therefore the decision became due on 26 July 2021.

On 23 July 2021, the AEC notified you that the period for processing your request had been extended by 30 days to enable us to consult with a third party under s 27 of the FOI Act. Accordingly, a decision on your request is due Tuesday, 24 August 2021.

### **Authorisation**

I am authorised under s 23 of the FOI Act to make this decision.

### **Material taken into account**

In making my decision, I have had regard to:

- the terms of your request
- the content of the documents identified as relevant to your request
- the FOI Act
- guidelines issued by the Office of the Australian Information Commissioner under s 93A of the FOI Act (**the Guidelines**)
- consultation responses from third parties consulted in accordance with the FOI Act.

### **Decision**

I arranged for searches to be undertaken and have identified documents set out in the attached schedule that fall within the scope of your request.

I have decided to release the documents except for the information you agreed to exclude from scope and material I have decided is exempt under ss 47E(d) and 47G(1)(a) of the FOI Act. My reasons for decision follow.

## Reasons for decision

### Section 22(1)(a)(ii) – irrelevant material

Section 22(1)(a)(ii) provides that information in a document that is irrelevant to the scope of a request can be redacted. Information that has been redacted under s 22 is the information you agreed to exclude from the scope of your request: the names, signatures or handwritten initials and contact details of Australian Electoral Commission staff, contractors and contract staff.

### Section 24A – Documents cannot be found or do not exist

Section 24A of the FOI Act provides that an agency may refuse a request for access to a document if all reasonable steps have been taken to find the document and the agency or Minister is satisfied that the document:

- is in the agency's or Minister's possession but cannot be found; or
- does not exist.

In response to your request, the AEC has undertaken searches of the internal commercial records management system. The AEC also considered whether the documents relevant to your request could have been found in other locations, such as older records management systems, hardcopy files or files saved on computers or portable devices.

After consulting with the Digital Technology and Communication Branch and the Commercial Law and Procurement Section, I am satisfied that the internal commercial records management system is the location in which all documents relevant to your request for the relevant time period would be held.

In order to retrieve these documents, searches were undertaken by staff in the Legal Services Section, ICT Finance, Digital Technology and Communications Branch and the Commercial Law and Procurement Section. The search terms used included the date, the contractor's given name, family name and contract number. The possibility of different spellings of common names was also considered, and the search terms included different alternatives of frequently used spellings of such names. The searches were conducted over the course of approximately one week, with several staff members involved across the aforementioned areas. Staff did not work full time on the request but spent approximately 10 hours compiling these materials. Limitations of the search largely stemmed from the fact that organisational restructuring between 2016 and the present resulted in changes to the internal commercial records management system. Noting these limitations, the Digital Technology and Communications Branch and ICT Finance were consulted in order to confirm that no other documents within the scope of this FOI Request were likely to be in the agency's possession

After undertaking these thorough searches, the AEC has been unable to locate documents in relation to 4 AEC contractors. Accordingly, I am satisfied that the documents cannot be found or do not exist and have decided to refuse access to the documents under s 24A.

## **Section 17 – Information stored in electronic form**

Section 17 requires an agency to produce a written document of information that is stored electronically and not in a discrete written form, subject to certain exceptions.

Document 62 contains information held in AEC's online contracting management software. This information was not held or able to be downloaded in a discrete form, so I have decided to provide access to a PDF document containing screenshots from our system.

## **Section 47E(d) – Certain operations of agencies exemption**

Section 47E(d) of the FOI Act provides that a document is conditionally exempt if its 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 parts of the documents which I have found to be conditionally exempt under s 47E(d) comprise the hourly rates paid to contractors for the engagement of personnel for services to the AEC, and information from which hourly rates could be deduced: maximum work hours, GST components and service charges. The rates paid to contracted service providers is confidential in nature and its disclosure could undermine the procurement functions of the AEC in future competitive tenders for similar personnel contracts.

The AEC is required to ensure that in all procurements, it achieves value for money and encourages competition: *Commonwealth Procurement Rules* [4.4]. The engagement of contracted service personnel is highly competitive and the release of hourly rates would have a substantial adverse effect on the AEC's ability to engage in the tender process and negotiate for similar contracts in future.

I have had regard to the age of the documents, which are 2-5 years old. There is nothing before me to suggest that the sensitivity of the information has diminished over time. I consider that the rates agreed to by the parties at the relevant points in time remain sensitive and would reveal information which is relevant to the current commercial environment.

I have therefore decided that the documents are exempt in part under s 47E(d) as set out the attached schedule.

## **Section 47G(1)(a) – Business documents exemption**

Section 47G of the FOI Act provides that a document is conditionally exempt if its disclosure would disclose information concerning a person in respect of his or her business or professional affairs or concerning the business, commercial or financial affairs of an organisation or undertaking, in a case in which the disclosure of the information:

- (a) would, or could reasonably be expected to, unreasonably affect that person adversely in respect of his or her lawful business or professional affairs or that organisation or undertaking in respect of its lawful business, commercial or financial affairs; or

...

The parts of documents which I have found to be conditionally exempt in part under s 47G(1)(a), contain information relating directly to the business affairs of contracted service providers. This comprises hourly rates paid to contractors and information

from which hourly rates could be deduced: hourly rates, maximum work hours, GST components and service charges.

In relation to procurements for contracted service personnel, there is a general understanding that hourly rates paid to recruiters is highly sensitive. This information is not generally provided to individual contractors and, in turn, the AEC is not generally privy to how much the recruiters pay the individual personnel. The AEC takes steps to protect information of this nature in its document management systems, including limiting the internal availability of procurement documents and strictly controlling access permissions.

I find that disclosure of the information could reasonably be expected to unreasonably affect third parties in respect of their lawful business, commercial or financial affairs by disclosing commercially sensitive information that could be used by competitors to gain an advantage in future tender processes.

The word 'unreasonably' in s 47G(1)(a) implies a need to balance public and private interests' (*Kazakhstan Potash Corporation Ltd and Australian Securities and Investments Commission* [2019] AATA 5035 at [81], citing the Guidelines at [6.187]-[6.191]).

I consider that the disclosure of these parts of the documents in response to this request would only minimally contribute to the public interest, given that I have decided to largely release the documents with only minor redactions. In that regard, I note that the total sums with respect to each the contracts are being released. On the other hand, the disclosure of the information could unreasonably impact on the third party's business interests by releasing information that is generally understood to be confidential.

I have also taken into account that the information is not otherwise publicly known and that the FOI Act does not limit the dissemination of the information. Further, I have taken into account the risk that personnel could be identified by their title and the period of the contract, and the disclosure of the hourly rates that apply to them may unreasonably impact their privacy.

I have decided that the documents are also exempt in part under s 47G(1)(a) as set out the attached schedule.

### **Section 11A(5) – The public interest**

Conditionally exempt documents must be disclosed unless, in the circumstances, access at this time would, on balance, be contrary to the public interest (s 11A(5) FOI Act).

I have taken into account the public interest in disclosing information held by a Government agency. I have also taken into account the objects of the FOI Act which include increasing public participation and debate in Government processes and increasing scrutiny, discussion and review of Government activities, as well as promoting oversight of public expenditure. I consider that release of the information would promote these public interest factors to a small degree. To the extent disclosure is in the public interest, that is satisfied by the disclosure of most of the information in the documents, including the overall amount of the contracts.

Weighing against those factors, I find that disclosure of the information could reasonably be expected to unfairly prejudice a business by disclosing information that competitors could use to determine their pricing and competitiveness in tender

processes. Disclosure could also undermine the ability of the AEC to engage in competitive tenders for contracted services personnel. I give these factors substantial weight.

On balance, I find that disclosure would be contrary to the public interest and the documents are exempt in part under ss 47E(d) and 47G(1)(a) of the FOI Act.

### **Review Rights**

If you are dissatisfied with any part of the decision you can ask for an internal review or request an independent review by the Office of the Australian Information commissioner (**OAIC**). You can also apply to the OAIC after an internal review has been conducted. **Attachment A** contains information about how to arrange a review.

### **For more information**

If you have any questions, please contact me at:

Email: [legal@aec.gov.au](mailto:legal@aec.gov.au)

Fax: 02 6293 7657

Post: Locked bag 4007, Canberra ACT 2601

Telephone: 02 62714662

Yours sincerely



Megan Weimar  
Principal Government Lawyer

24 August 2021

**Schedule of documents – LEX418**

Document no.	Date	Description	Decision on access	Exemption
1	29-Feb-16	AEC16 063 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a) <sup>1</sup>
2	1-Mar-16	AEC14-101 - Draft Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
3	1-Mar-16	AEC16 068 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
4	8-Mar-16	AEC16-111 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
5	8-Mar-16	AEC16-112 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
6	9-Mar-16	AEC16-118 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
7	11-Mar-16	AEC16-106 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
8	15-Mar-16	AEC16-124 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
9	16-Mar-16	AEC14-101 - IV & V contract management plan	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	

<sup>1</sup> Where the redaction in the documents shows 47E(d), this material is also exempt under s 47G(1)(a).

10	16-Mar-16	Internal email regarding SuperFAD search	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
11	16-Mar-16	AEC16-128 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
12	21-Mar-16	AEC14-101 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
13	22-Mar-16	AEC16-138 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
14	26-Mar-16	AEC16-063 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
15	29-Mar-16	AEC14-101 - Deed of Variation No. 1 to Contract AEC14-101-01 (executed)	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
16	29-Mar-16	AEC14-101 - Deed of Variation No. 1 to Contract AEC14-101-01	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
17	29-Mar-16	Email IV & V to AEC regarding work order variation	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
18	19-May-16	AEC14-101 - Deed of Variation No. 2 to Contract AEC14-101 (executed)	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
19	10-Jun-16	AEC16-670 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
20	15-Jun-16	AEC14-101 - Deed of Variation No. 3 to Contract AEC14-101-01 (executed)	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
21	15-Jun-16	Email IV & V to AEC regarding deed of variation	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	



22	16-Jun-16	AEC14-101 - Deed of Variation No. 3 Contract AEC14101-01	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
23	17-Jun-16	AEC16-675 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
24	17-Jun-16	Internal email regarding Rule 18 approval of IV&V Variation No 3	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
25	20-Jun-16	AEC16-106 - Letter of extension	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
26	20-Jun-16	AEC16-124 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
27	20-Jun-16	AEC16-138 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
28	21-Jun-16	AEC16-106 - Deed of Variation 1	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
29	27-Jul-16	AEC16-138 - Change Order 2	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
30	1-Aug-16	AEC16-106 - Deed of Variation 2	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
31	8-May-17	AEC17-070 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
32	18-May-17	AEC17-082 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
33	24-May-17	AEC17-088 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)

34	1-Jun-17	AEC17-101 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
35	15-Jun-17	AEC17-113 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
36	4-Jul-17	AEC17-165 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
37	31-Jul-17	AEC17-201 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
38	3-Aug-17	AEC17-201 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
39	9-Aug-17	AEC17-200 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
40	18-Aug-17	AEC17-219 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
41	10-Oct-17	AEC17-256 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
42	24-Nov-17	AEC17-103 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
43	24-Jan-18	AEC18-014 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
44	24-Jan-18	AEC18-017 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
45	21-Mar-18	AEC17-070 - Change order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)

46	21-Mar-18	AEC17-101 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
47	21-Mar-18	AEC17-201 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
48	21-Mar-18	AEC17-256 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
49	23-Mar-18	AEC18-143 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
50	9-Apr-18	AEC18-056 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
51	9-Apr-18	Page 9 of Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
52	10-Apr-18	AEC18-155 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
53	14-May-18	AEC18-056 - Change Order 2	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
54	24-May-18	AEC17-113 - Change Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
55	13-Jun-18	AEC18-267 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
56	22-Jun-18	AEC18-276 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
57	22-Jun-18	AEC18-329 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)

58	22-Jun-18	AEC18-350 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
59	27-Jun-18	AEC18-355 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
60	4-Dec-18	AEC14-101 Letter of extension to IV & V	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
61	11-Dec-18	AEC18-268 - Deed of Variation 1	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
62	11-Dec-18	14-101 - Deed of Standing Offer Information	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	
63	12-Dec-18	AEC17-201 - Deed of Variation 1	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)
64	Undated	AEC18-056 - Work Order	Release in part; irrelevant information redacted under s 22(1)(a)(ii)	47E(d) and 47G(1)(a)

## ATTACHMENT A

### RIGHTS OF REVIEW

#### ***FREEDOM OF INFORMATION ACT 1982***

The *Freedom of Information Act 1982* (**FOI Act**) gives you the right to apply for a review of a Freedom of Information (**FOI**) decision. Under section 54 and section 54L of the FOI Act, you can apply for a review of an FOI decision by:

1. an internal review officer in the Australian Electoral Commission (the **AEC**); and/or
2. the Office of the Australian Information Commissioner (the **OAIC**).

There are no fees associated with requesting a review of an FOI decision.

#### **Applying for an internal review by the AEC**

If you apply for internal review, a different decision maker to the delegate who made the original decision will carry out the review. The internal review officer will consider all aspects of the original decision and decide whether the decision should be changed. An application for internal review must be:

- made in writing;
- made within 30 days of receiving this letter;
- be sent, quoting reference number LEX418;
  - by email to [legal@aec.gov.au](mailto:legal@aec.gov.au); or
  - by mail to Locked bag 4007 CANBERRA ACT 2601.

#### **Applying for external review by the OAIC**

If you disagree with the original decision or the internal review decision, you can ask the OAIC to conduct an independent review of the original FOI decision.

You may also apply to the OAIC if you have not been informed of the outcome of an internal review within 30 days.

Your application for OAIC review must:

- be sent within 60 days of being notified of the decision;
- if you have one, include a copy of the decision on your FOI request;
- set out the reasons(s) why you disagree with the decision; and
- include an address where notices can be sent (eg your email address).

You may lodge your application for OAIC review:

- online by using the OAIC 'Review Application Form', available at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>
- by email to [foidr@oaic.gov.au](mailto:foidr@oaic.gov.au)
- by mail to:  
Director of FOI Dispute Resolution  
GPO Box 5218  
SYDNEY NSW 2001
- by fax to 02 9284 9666

For further details regarding the OAIC visit [www.oaic.gov.au](http://www.oaic.gov.au)

## Complaints

### ***Office of the Australian Information Commissioner***

Any complaint about the processing of your FOI request can be forwarded to the OAIC. The complaint must be in writing and identify the agency against which the complaint is made. There is no particular form required to make a complaint, but the complaint should set out the grounds on which you consider the action should be investigated. The OAIC's contact details are:

- telephone: 1300 363 992
- website: [www.oaic.gov.au](http://www.oaic.gov.au)

### ***Commonwealth Ombudsman***

The Commonwealth Ombudsman also has the power to investigate the AEC's actions and make recommendations where appropriate. Complaints made to the Commonwealth Ombudsman may be made in person, by telephone or in writing. The Commonwealth Ombudsman will consult with the OAIC before deciding who should investigate your complaint. The Commonwealth Ombudsman's contact details are:

- telephone: 1300 362 072
- website: [www.ombudsman.gov.au](http://www.ombudsman.gov.au)