STATE OF WISCONSIN **CIRCUIT COURT BRANCH 15** **DANE COUNTY**

ELECTION SYSTEMS & SOFTWARE, LLC et al.,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,

Respondent.

Case No. 18-CV-972

DECISION AND ORDER ON PETITION FOR JUDICIAL REVIEW

Election Systems & Software, LLC, and Dominion Voting Systems, Inc., petition the court for review of a final decision of the Wisconsin Elections Commission (the "Commission"). Petitioners are voting equipment vendors whose voting machines were used in this state in the 2016 general election. For the reasons stated below, the decision of the Commission is AFFIRMED.

BACKGROUND

This matter arises out of the request of Jill Stein's 2016 election campaign (the "Campaign") under Wis. Stat. § 5.905(4) for access to petitioners' voting machine software components. The statute requires that the Commission grant access to the software components if, before receiving access, the person granted access enters into a written agreement with the Commission "that obligates the person to exercise the highest degree of reasonable care to maintain the confidentially [sic] of all proprietary information to which the person is provided access." Wis. Stat. § 5.905(4). After receiving the Campaign's request, the Commission worked

with both the petitioners and the Campaign to devise a plan to grant access that would be reasonable, meaningful, and consistent with § 5.905(4). As part of the plan, the Commission approved a written confidentiality and nondisclosure agreement to be signed by the Campaign's designated experts (R. 006; R. 021-22.)

Following a process of negotiation and review of written and oral testimony, the Commission issued a final decision on March 15, 2018, which included the written confidentiality agreement. The only aspect of the Commission's final decision relevant to this review is the scope of the confidentiality and nondisclosure agreement.

STANDARD OF REVIEW

An appeal from a determination made by the Commission is reviewable under Wis. Stat. § 227.57. *See* Wis. Stat. § 5.06(9). Section 5.06(9) states, in part:

> The court shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57.

Administrative review is confined to the record. Wis. Stat. § 227.57(1). "Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action . . . , it shall affirm the agency's action." Wis. Stat. § 227.57(2).

"The court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law[.]" Wis. Stat. § 227.57(3). The court affords no deference to the agency's conclusions of law. *See Tetra Tech EC Inc. v. DOR*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21. However, "due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it." Wis. Stat. § 227.57(10). In all events, the petitioners

bear the burden of demonstrating that the agency's decision should be modified or set aside. *See Bethards v. DWD*, 2017 WI App 37, ¶ 16, 376 Wis. 2d 347, 899 N.W.2d 364.

ANALYSIS

Petitioners argue that the Commission committed legal error in drafting the confidentiality and nondisclosure agreement required by Wis. Stat. § 5.905(4) and request that the court modify the agreement. Subsection (4) reads:

> If a valid petition for a recount is filed . . . in an election at which an electronic voting system was used to record and tally the votes cast, each party to the recount may designate one or more persons who are authorized to receive access to the software components that were used to record and tally the votes in the election. The commission shall grant access to the software components to each designated person if, before receiving access, the person enters into a written agreement with the commission that obligates the person to exercise the highest degree of reasonable care to maintain the confidentially [sic] of all proprietary information to which the person is provided access, unless otherwise permitted in a contract entered into under sub. (5).

Wis. Stat. § 5.905(4). The Commission-approved confidentiality agreement mirrors the language of the statute and provides, in part:

> 2. Recipient agrees to exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information to which access is provided and not disclose or reveal any proprietary information to any person, pursuant to Wis. Stat. § 5.905(4).

The agreement states that the Campaign's obligation to maintain confidentiality is perpetual and that the Campaign "is responsible for any unauthorized disclosure and shall pay for any and all damages that relate or arise out of the review of the software components."

As in all cases that involve statutory interpretation, I begin with the text of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. We give statutory language "its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special

definitional meaning." *Id.* "Context is important to meaning. So, too, is the structure of the statute in which the operative language appears." *Id.*, ¶ 46. Courts interpret statutory language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Bruno v. Milwaukee Cnty.*, 2003 WI 28, ¶ 20, 260 Wis.2d 633, 660 N.W.2d 656.

Turning to the text of the statute, sub (4) provides that a party to a valid recount of an election at which an electronic voting system was used "may designate one or more persons who are authorized to receive access to the software components that were used to record and tally the votes in the election." Wis. Stat. § 5.905(4). Software components are defined for the purposes of § 5.905 by an illustrative list: "'software components' include vote-counting source code, table structures, modules, program narratives and other human-readable computer instructions used to count votes with an electronic voting system." Wis. Stat. § 5.905(1). The Commission is required by the statute to:

> [G]rant access to the software components to each designated person if, before receiving access, the person enters into a written agreement with the commission which obligates the person to exercise the highest degree of reasonable care to maintain the confidentially [sic] of all proprietary information to which the person is granted access[.]

Wis. Stat. § 5.905(4). In this regard, the parties agree that the Commission has no discretion: it *shall* grant access if the written agreement is entered into by the designated person. The only real dispute before this court is over what the agreement must say.

The core of petitioners' argument is that protection of their propriety information requires more than a mere parroting of the statutory text in the agreement. Petitioners contend that the

agreement should have imposed specific conditions prohibiting the Campaign from publicly discussing its beliefs or criticisms formed after reviewing petitioners' proprietary information. Petitioners argue for heightened protection because the act of reviewing confidential software components and then publicly discussing the review constitutes an unauthorized use or disclosure of proprietary information—*i.e.*, there is no other way for the Campaign to publicly discuss the conclusions it may draw without seeing and therefore *using* the petitioners' proprietary information to form its conclusions. Such use or disclosure would not meet the requirement of exercising the highest degree of reasonable care to maintain the confidentiality of petitioners' proprietary information.

The Commission and the Campaign disagree with petitioners' position, arguing the Commission was not statutorily authorized to require anything more than it did. Alternatively, publicly discussing the review by giving an opinion or critique regarding the software is not a *per se* unauthorized use or disclosure of proprietary information, absent actual disclosure of the software components' source code or other proprietary information. Thus, respondents contend, the Commission did not have the authority to prohibit public discussion of the review because the statute does not contemplate such a restriction on speech. They further argue that, to the extent the Campaign fails to maintain confidentiality of the source code or other propriety information, the Campaign is already obligated to pay for any and all damages that arise out of the Campaign's access to the software components. Any further protections would be superfluous, as the Campaign recognizes and accepts its obligation to maintain the confidentiality of petitioners' proprietary information.

After reading the statute, I find it is unambiguous. In the context of § 5.905 as a whole, it is clear the purpose of the statute is to provide for the maintenance of the confidentiality of

voting machine vendors' software components and the verification of the software's accuracy. Subsection (1) defines software components; subsection (2) requires the Commission hold the software components in escrow and maintain them in strict confidence as part of the election process; subsection (3) requires the Commission promulgate rules to ensure the security, review and verification of the software components as part of the election process; and subsection (4) requires the Commission to grant access to the software components to a party who files a valid recount petition. Subsection (5) also provides that a county or municipality may contract with a vendor directly to permit a greater degree of access to the software components than is required under subsection (4). Nowhere in § 5.905, and specifically in subsection (4), did the legislature provide for additional protections for the software components over and above the requirement that they be held in strict confidence and that a party to a recount must agree to "exercise the highest degree of reasonable care to maintain the confidentiality of all proprietary information" to which the party is given access.

Here, the confidentiality agreement signed by the Campaign does exactly what the statute requires. The petitioners' proprietary information which is subject to the Campaign's review is the software components, which includes vote-counting source code, table structures, modules, program narratives and other human-readable computer instructions. The Commission's decision also requires every person given access to the software to sign an agreement not to "disclose or reveal" the code and no one may copy it or create derivative works from the source code. In addition, the Commission required physical security measures, as requested by petitioners. The security measures include the use of a secured room, "read only" access to the software, and a prohibition on input/output devices and cellphones. In relation to petitioners' source code, then, the Campaign is prohibited from doing anything other than running a manual code review in a

secured room, without the ability to write down, copy, reproduce, or create a derivative work of the source code.

Petitioners point to no other controlling authority requiring the Commission to do more than what it did in this case. Simply, the statute imposes only the restriction that petitioners' proprietary information—the software components—be held in strict confidence. Agencies have "only those powers which are expressly conferred or which are necessarily implied by the statues under which it operates." *Wis. Ass'n of State Prosecutors v. WERC*, 2018 WI 17, ¶ 37, 380 Wis. 2d 1, 907 N.W.2d 425. Black's Law Dictionary defines "proprietary information" as "Information in which the owner has a protectable interest. *See* Trade Secret." BLACK'S LAW DICTIONARY (10th ed. 2014). Trade secrets are defined in the Wisconsin Uniform Trade Secret Act as follows:

> "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
>
> > 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
> >
> > 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

Wis. Stat. § 134.90(1)(c). It is plain that petitioners' software components fall within the definition of proprietary information. Under either definition, however—proprietary information or trade secret—no reference is made to opinions or mental impressions of a non-owner of the protected information. Certainly, the disclosure of petitioners' source code itself would be a violation of the confidentiality agreement using either term. Discussion of the source code, though, without disclosing or reproducing the source code verbatim is a different matter.

Petitioners suggest the Trade Secret Act applies in this case and otherwise provides guidance on the protections the confidentiality agreement should have included. This argument is to no avail. Notwithstanding the fact that portions of petitioners' source code may indeed be considered trade secrets, no party in this case has taken the position that petitioners' software components are not subject to the Commission's confidentiality agreement. Swapping the term "proprietary information" with "trade secret" does little in this case. Moreover, the term "proprietary information" offers broader protection than that offered by "trade secrets." *See IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 583-84 (7th Cir. 2002) (finding that it is not plausible to assert that "all information in or about [plaintiff's] software is a trade secret."). It is not necessarily a given that disclosure of a portion of petitioners' source code would be disclosure of a trade secret. Finally, it appears that nothing in Wis. Stat. § 5.905 supplants or preempts the rights petitioners have in protecting their trade secrets under Wis. Stat. 134.90(1)(c).

By way of example, a nutritionist might be given access to the secret formula for Coca Cola, which is undeniably a proprietary information and a trade secret. It would not be an unauthorized use or a disclosure of the trade secret for the nutritionist to say, "After seeing the secret formula, I can tell you that Coca Cola is unhealthy and I would never let my own children drink it." If, however, the nutritionist revealed specific ingredients, proportions, and sequence of the secret formula to support that opinion, that would be an unauthorized disclosure of the trade secret. The same goes for petitioners' software components. After the Campaign's review, its experts might say, "The software works as expected," or "We think the accuracy of the software's vote-counting function is vulnerable to third-party interference and needs to be improved." The Campaign is not permitted, by the express terms of confidentiality agreement, to

reveal the source code itself to support its assessment. Regardless of whether trade secret law applies, the Campaign is prohibited from revealing any of petitioners' proprietary information and is subject to a confidentiality agreement and the security measures imposed by the Commission. An opinion—even if formed after viewing the proprietary information—is not by itself proprietary information. Petitioners have failed to cite to any relevant authority that would lead me to conclude otherwise.

To modify the Commission's decision as petitioners request would go beyond both the text of the statute and the definition of proprietary information. Without further legislative direction, it cannot be said that the Commission failed to correctly apply the statute. As such, I do not find grounds for modifying or reversing the Commission's final decision.

IT IS THEREFORE ORDERED THAT:

1. The Wisconsin Election Commission's decision is AFFIRMED.
2. Petitioners' petition for judicial review is DISMISSED.

Dated: December 21, 2018

By the Court:

Stephen E. Ehlke
Circuit Court Judge – Branch 15

cc: Counsel of record