STATE OF MINNESOTA   DISTRICT COURT

COUNTY OF ANOKA   TENTH JUDICIAL DISTRICT

J██ A██ J██,
                                        FILED
                Petitioner,   Court Administration

v.   JUN 23 2009   ORDER

                                     Anoka County, MN   Court File No. 02-CV-09-191
Commissioner of Public Safety,
                                        Deputy

                Defendant.

The above-entitled matter came on for hearing before the Honorable ██████████,

Judge of District Court, on June 17, 2009, pursuant to Petitioner's motion to compel discovery of

the source code for the Minnesota Model Intoxilyzer 5000EN. By agreement of the parties the

implied consent issues were bifurcated, and all issues other than the request for the source code

were reserved.

Petitioner appeared by her attorney D██ R██, Esq.

The Commissioner was represented by J██ B██, Esq.

Based upon the evidence offered at the hearing, the arguments of counsel and the files

and records, herein, the Court makes and enters the following:

ORDER

1. Petitioner's Motion for Discovery of the Intoxilyzer 5000EN source code is **GRANTED**.
   The State shall produce for Petitioner's inspection the complete source code for the
   Minnesota Model Intoxilyzer 5000EN within 30 days of entry of this Order.

2. If the source code has not been delivered to Petitioner's counsel as described in
   Paragraph 1 above, Petitioner may bring a motion for sanctions which may include a
   request that the results of the Intoxilyzer test be excluded from the State's case.

3. The Court Administrator shall notify the parties of this Order by mailing copies to the
   parties.

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4. The attached Memorandum is hereby incorporated into and made a part of this Order.

Dated: 6/23/09

BY THE COURT:

HONORABLE ████████████
Judge of District Court

MEMORANDUM

Facts

Petitioner J███ A██ J███ was arrested for driving while intoxicated on December

16, 2008. She was transported to the Coon Rapids Police Department and read the Minnesota

Implied Consent Advisory. Petitioner agreed to take the breath test. The test was administered

using the Minnesota Model Intoxilyzer 5000EN. The test indicated an alcohol concentration of

.11. Petitioner's license was revoked for driving with an alcohol concentration above .08.

Petitioner moves this Court for an Order compelling production of the complete source code for

the Minnesota Model Intoxilyzer 5000EN.

Discussion

I.   Relevance

The issue in this case is controlled by the recent decision of the Minnesota Supreme

Court in State v. Underdahl, --- N.W.2d ----, 2009 WL 1150093 (Minn. 2009) ("Underdahl II").

In a criminal case, discovery of a source code is discretionary with the Court. Minn. R. Crim. P.

9.01, subdiv. 2(3) (2008). The Court in its discretion may order disclosure of any relevant

material upon a showing that the material may relate to the guilt or innocence of the Petitioner,

negate guilt or reduce culpability. Id. The Underdahl II Court construed the language from Rule

9 to require the Petitioner to make some "plausible showing" that the material would be both

material and favorable to his defense. Underdahl II, at *7.

In an implied consent case, judicial review of a license revocation provides for very

limited discovery. Minn. Stat. § 169A.53, Subdiv. 2(d). In fact, discovery is limited to four

enumerated items unless the party requests and receives a court order. Id. The source code for

the Intoxilyzer 5000EN is not one of the enumerated items of discovery. Id. For any non-

enumerated discovery, a petitioner must ask for a court order compelling production of the additional discovery. Although Underdahl II was a criminal case this Court accepts the reasoning from Underdahl II, and requires petitioners requesting an Order compelling production of the source code to make a showing of relevance.

In Underdahl II, the Court clarified that the threshold is minimal and need not be directly related to the operation of the specific machine which conducted the test. Underdahl II, at 8. In Underdahl II, Petitioner Brunner submitted a memorandum giving various definitions of the term "source code," the written testimony of a computer science professor explaining source code problems in voting machines, and a report from Petitioners in a case in another state analyzing source code defects. Id. at 7-8. The trial court ordered the State to produce the source code and the Supreme Court affirmed. Id.

Here, Petitioner submitted multiple exhibits that explain what a source code is, how it works, the possible deficiencies that could be discovered through an examination of the source code, and how these deficiencies could be relevant to Petitioner's case. (Petitioner Ex. A. – Defense report from State v. Chun referred to in Underdahl II; P. Ex. B. — Written testimony of D███W███, computer science PH.D.; P. Ex. H – Declaration of T███W███; P. Ex. I. Source Code Primer, by T███W███; J. Ex. I. – Affidavit of T███B███). Petitioner has met the threshold burden to show relevancy as established by Underdahl II.

II.   Possession and Control

The Commissioner opposes the discovery motion on the basis that it is not in possession of the source code. The Supreme Court answered that question in Underdahl II as well, relying upon Underdahl I, 735 N.W.2d 706, 708-09 (Minn. 2007), and the language from the State's contract with the manufacturer of the machine. The Supreme Court affirmed a finding that the

State does have possession or control of the source code within the meaning of the Rules of

Discovery. There is no basis for this Court to rule to the contrary. Petitioner's discovery motion

is granted.

SLH