



MIKE SCHMIDT, District Attorney for Multnomah County

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December 17, 2020

Dee Williams
Diannadee@live.com (VIA EMAIL ONLY)

Erik Van Hagen
Director, Legal Services
1800 SW 1st Ave., Suite 300
Portland, Oregon 97201
VanhageE@trimet.org (VIA EMAIL ONLY)

Re: Petition of Dee Williams requesting copies of TriMet records.

Dear Ms. Williams and Mr. Van Hagen:

In her public records petition dated November 5, 2020, petitioner Dee Williams asks us to order TriMet to release copies of records that she believes will assist in her unfair labor practice grievance that she has filed against TriMet and her union. Those records include the following:

1. **“WWA Pay Schedules for "Transportation Other" from WWA 2001.**
2. **“Personnel Orders” from 2007 to the present date 2020 for the following employees...**
 - a. **Catherine J. Tolle, [Schedule Writer II]**
 - b. **Michelle M. Davis, [Road Supervisor]**
 - c. **Dianna D. Williams, [Petitioner]**
 - d. **Arelina Russell, [retired in 2020 as a Training Supervisor]**
 - e. **Robert A. Finke, [Schedule Writer II]**
 - f. **Steven R Johnson, [Schedule Writer II]**
 - g. **Travis J. Slyter, [Rail Supervisor] and**
 - h. **Valerie M. Tyler, [Rail Supervisor].**
3. **Any and All Applications, testing, Interview scores, qualifications, supplemental questions, scoring, and all information that is related to the above employees' different classification changes.**
4. **'Bump back' Letter to Michelle M. Davis, 2986 regarding her 'bump back' to Operator, from Rail Supervisor, due to 2010 to Budget bump backs. Schedule**

Writers 'bump back letters were written June 21, 2010, so guessing in that time frame.

- 5. Who Trained Schedule Writer 2's Robert A. Finke, 7466 and Steven R. Johnson, 6912. How long was their training period? What did their training entail? How many schedules have these Schedule Writers 2's written, on their own with no supervision since being hired? Have these Schedule Writers done any "field" work?"**

Petitioner is a TriMet rail operator who filed a grievance in 2019 against TriMet. Petitioner then filed an unfair labor practice claim in March of 2020 against her union and TriMet. Petitioner's public records request was denied on April 9, 2020. Her matter is currently before an administrative law judge.

TriMet states that Petitioner has been provided with responsive records to Request Number (No.) 1 and informed Petitioner on how to request her own employment records through Human Resources, the subject of Request No. 2(c). For those reasons we do not address this portion of the petition.

TriMet asserts that the remainder of Request No. 2 is exempt pursuant to ORS 192.355(2)(a) and conditionally exempt pursuant to ORS 192.345(9). TriMet has provided to us, as a confidential submission, the records pertaining to Request No. 2.

TriMet has provided, as a confidential submission, a sample of records pertaining to Request No. 3 and TriMet asserts that the records are exempt pursuant to ORS 192.355(2)(a) and conditionally exempt pursuant to ORS 192.345(9).

The "bump back" letter in Request No. 4 is a reference to procedures within the collective bargaining agreement between TriMet and the Amalgamated Transit Union Division 757 in addressing seniority "layoffs and rehiring of employees based on seniority."¹ TriMet has provided to us, as a confidential submission, the records pertaining to Request No. 4 and TriMet asserts that these records are exempt pursuant to ORS 192.355(2)(a) and conditionally exempt pursuant to ORS 192.345(9).

TriMet asserts that Request No. 5 is a series of interrogatories and not a request for public records. We agree that this is not a public records request and, therefore, not subject to the district attorney's appellate jurisdiction.

For the reasons discussed below, we deny the petition.

DISCUSSION

A. Investigatory information relating to an unfair labor practice complaint – ORS 192.345(9)

ORS 192.345(9) conditionally exempts from disclosure investigatory information relating to any complaint or charge filed under ORS 243.676 and 663.180.

¹ TriMet's Response to Petition of Dee Williams Seeking TriMet Records, page 2.

ORS 663.180 outlines the process of filing an unfair labor practice complaint. ORS 243.676 outlines the process of investigating an unfair labor practice complaint. TriMet has provided a copy of the complaint filed by petitioner for our review.

TriMet has also provided, as a confidential submission pursuant to ORS 192.355(4), over 400 pages of records that are responsive to petitioner's request, which we have also reviewed. All of the records are the employment records of petitioner's coworkers. The records are business records kept in the ordinary course of TriMet's operations. Except for a number of surgical redactions based upon ORS 192.355(2)(a)², the records would not be exempt from release under the Oregon Public Records law.

However, the legislature has provided a conditional exemption for records held by a public agency when there is an investigation related to an unfair labor practice complaint. There is no definition for the term "investigatory information." In the context of a criminal investigation, the term "investigatory information" has been found to apply to "information originally compiled for ordinary business purposes that is subsequently gathered in the course of an investigation." PUBLIC RECORDS AND MEETINGS MANUAL (2019) at 59. None of the records that have been requested were created as a part of the investigation. But it is clear in a review of the records that they are related to the unfair labor practice investigation and we conclude that the records requested by petitioner are subject to the conditional exemption.

An exemption in ORS 192.345 applies, unless the public interest requires otherwise. The analysis is a two-step process. The first part is to "determine what the competing interests are in disclosure and nondisclosure." *Id.* at 32. The second part is to "weigh those interests and determine which predominates, with the presumption in favor of disclosure." *Id.*

Petitioner has not advanced any public interest basis for the release of the records at this time. Petitioner has requested the records to advance her private claim against her union and her employer. TriMet believes that releasing the records, which are the employment records of petitioner's coworkers, into the public arena at this time could interfere with the proceedings, as many of employees are a part of the same union and currently work for TriMet.

TriMet concedes that the conditional exemption would not apply to the records once the matter is concluded. In the absence of any argument from petitioner that these records are of public interest in this private matter, we conclude the public release of these records could interfere with the complaint process and that the risk of disclosure outweighs petitioner's interests.

This conclusion would seem to be an unjust result for petitioner, as these records are potentially a part of her case against her union and TriMet. Receipt of the records post-adjudication of her complaint will bring little comfort. However, there is another method of records production that applies to her unfair labor practice complaint. Oregon Administrative Rule 115-010-0055 provides for the issuance of subpoenas "for the production of records or other documents."

² ORS 192.355(2)(a) exempts from disclosure "Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if public disclosure would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in the particular instance. The party seeking disclosure shall have the burden of showing that public disclosure would not constitute an unreasonable invasion of privacy."

As the records that are requested are conditionally exempt under ORS 192.345(9), we will not address the application of ORS 192.355(2)(a) to discreet portions of the documents that also are exempt under ORS 192.355(2)(a).

ORDER

Accordingly, the petition is dismissed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", written over a horizontal line.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon