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April 18, 2022

VIA EMAIL ONLY

Philip Brazina
BrazinaP@trimet.org

Erik Van Hagen
Director Legal Services – TriMet
VanhageE@trimet.org

Re: Petition of Philip Brazina seeking test results from TriMet

Dear Mr. Brazina and Mr. Van Hagen:

Petitioner, Philip Brazina, has appealed TriMet’s denial of his request for “the test scores of the current Dispatch hiring.” Mr. Brazina is a TriMet employee and, along with others, has applied to be a dispatcher. The dispatcher application process requires that all candidates complete a series of tests that are one factor in the evaluation of the candidates.

TriMet has informed us that, following the testing phase, certain candidates are invited to participate in interviews, and the interview results combined with the testing scores will identify the successful candidate or candidates for the recruitment.

Because the hiring process is still ongoing, TriMet denied petitioner’s request for the test scores, citing the internal advisory communication exemption in ORS 192.355(1). TriMet informs us that it intends to release the test scores, with the names of the other applicants redacted, to requestor after it has completed the hiring process.

Although we sympathize with TriMet’s desire to maintain the integrity of its hiring process, the public records law does not permit the withholding of factual information under this exemption.

DISCUSSION

A. Internal Advisory Communications – ORS 192.355(1)

ORS 192.355(1) exempts from disclosure under the public records law:

Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the

public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure.

Although there are many elements a public body must meet to defend a claim of exemption under this section, the only one relevant to our discussion is that the exemption only applies to non-factual materials.

The record provided to us for review contains the names of the applicants, their raw scores in four different tests, and then some calculations drawn from those raw scores (percentile and weighted percentile rank). One of the tests interprets those raw scores as “highly proficient” “proficient” and “not proficient” in a way that seems directly tied to numerical cutoffs in the raw score. There is also a “notes” column. Of these, only “notes” is non-factual and, in this instance, they are so trivial that they are unquestionably not “frank communication.”

TriMet argues that it is not proper to release these records at this time because, a candidate with information about the test results would gain insight into their standing relative to other candidates as they prepare for interviews. True though this may be, there is no public interest or general fairness component to analysis under this exemption. So too with TriMet’s argument that disclosing the weighting that TriMet places on each of the four tests would unfairly advantage petitioner.

TriMet further argues that the public records law contains a general preference for allowing pending or in progress matters to reach finality prior to release. In support of this TriMet points to six different records exemptions that do exempt material, but only until the conclusion of the relevant proceeding or process. This is true as to those specific exemptions, but neither the text of ORS 192.355(1) nor the opinions interpreting it contain any similar limitation. Indeed, as to ORS 192.355(1) specifically, the Attorney General has written:

Public bodies sometimes mistakenly take the view that preliminary reports or recommendations may be withheld simply because they have not been reviewed or finalized. However, drafts or incomplete records are not inherently exempt from disclosure.

PUBLIC RECORDS MANUAL (2019) at 87.

Lastly, TriMet argues that the score table ranks candidates and thereby is a non-factual interpretation and analysis of test scores. We disagree. The factual material in this record permits the reader to perform precisely the analysis TriMet describes. But the data itself is not analysis, it is data. To the extent that TriMet is arguing that having sorted the raw data from highest to lowest represents “analysis” it is such a trivial analysis that it cannot be considered “frank communication” within the meaning of this section.

Because all the information in the record submitted to us is factual, or so innocuous as to be irrelevant, TriMet has not met its burden of establishing that ORS 192.355(1) exempts the material from disclosure.

However, the names of the other applicants for this position may be redacted pursuant to ORS 192.355(2).

ORDER

Accordingly, the petition is granted. TriMet is ordered to release to petitioner a copy of the test scores. The names of other test-takers may be redacted from the production. This release is subject to the payment of fees, if any, as authorized by ORS 192.324(4).

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", with a long horizontal stroke extending to the right.

MIKE SCHMIDT
District Attorney
Multnomah County, Oregon

Notice to Public Agency

Pursuant to ORS 192.411(2), 192.415, and 192.431(3) your agency may become liable to pay petitioner's attorney's fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within seven days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within seven additional days thereafter.