



**MIKE SCHMIDT**, District Attorney for Multnomah County

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Dan Balaban  
Editor – Mobility Payments  
dan.balban@mobility-payments.com [via email only]

Eric Van Hagen  
Director Legal Services – TriMet  
1800 S.W. 1<sup>st</sup> Avenue, Suite 300  
Portland, Oregon 97201

Re: Petition of Dan Balaban seeking cost information from a bid to provide TriMet with payment processing services

Dear Mr. Balaban and Mr. Van Hagan:

In his public records petition, Dan Balaban asks this office to order TriMet to disclose “records that show the amount of fees and fee rates that TriMet pays to its acquirer to accept credit and debit cards, in particular the individual fee rates pays to accept cards branded Visa, Mastercard and American Express.” Petitioner, the editor of *Mobility Payments* magazine, made a public records request to TriMet for this information. TriMet communicated with petitioner, clarified the scope of the request, provided some information, but ultimately denied his request for the granular detail of the payment formula that petitioner sought.

The specific fees at issue here are “open loop payments,” whereby a transit passenger can use contactless payment cards to directly pay a fare without a TriMet ticket or pass being involved. TriMet is an early adopter of this technology and, as part of its implementation, issued a Request for Proposal (RFP) to payment processors. Wells Fargo submitted a proposal and was selected as the winning bidder. Wells Fargo currently provides TriMet open loop payment processing under the terms of the resulting agreement.

As detailed below, petitioner already has gross financial figures relating to open loop payment processing by TriMet but here seeks the formula used by Wells Fargo to calculate fees owed to it by TriMet. TriMet denied petitioner’s request for this information arguing that 1) it was submitted in confidence to TriMet under the terms of the RFP and, 2) the fee formula constitutes a trade secret of Wells Fargo.

For the reasons discussed below, we find that this information was submitted to TriMet in confidence and that TriMet has met its burden of establishing the elements set out in ORS 192.355(4) necessary to withhold it from disclosure. As such, we deny the petition.

## DISCUSSION

### A. Confidential Submission – ORS 192.355(4)

ORS 192.355(4) exempts from disclosure information submitted to a public body in confidence if all five of the following elements are satisfied:

1. the informant must have submitted the information on the condition that it would be kept confidential;
2. the informant must not have been required by law to provide the information;
3. the information itself must be of a nature that reasonably should be kept confidential;
4. the public body must show that it has obligated itself in good faith not to disclose the information; and
5. disclosure of the information must cause harm to the public interest.

The first, second, and fourth elements are readily disposed of in this case. TriMet's RFP prospectively informed companies that they could submit materials confidentially; the costing data in question was, in fact, designated as confidential by Wells Fargo; and Wells Fargo had no legal obligation to bid on the project.

The third and fifth elements are frequently intertwined. ATTORNEY GENERAL'S PUBLIC RECORDS MANUAL (2019) at 104-05. Wells Fargo asserts that it does not know the cost calculation formulas used by its competitors and, as such, would be at a competitive disadvantage were its own formula released publicly. TriMet explains:

where pricing information is a key component of awarding a contract, confidentiality is in the public interest as it promotes competition among bidders. [... T]ransit agencies throughout the world are in the process of soliciting bids for open loop payment systems, and protecting the confidentiality of pricing terms reasonably protects both transit agencies and maintains a competitive bidding environment.

The Attorney General has previously recognized that cost calculation information submitted as part of a bid can be commercially sensitive and, provided appropriate precautions are taken, eligible for trade secret protection under Oregon public records law.

[D]isclosure [of price lists in a bid] would harm the public's interest in OHSU's ability to attract bidders to provide services [...]. If OHSU were unable to guarantee the confidentiality of trade secret information such as the price lists here, its ability to attract bids likely would be substantially curtailed, and the public's costs for providing the care increased. In our view, this detriment to the public interest outweighs any benefit that would result from disclosure.

In accordance with this guidance, we conclude that the cost calculation formula in Wells Fargo's submission is of a nature that reasonably should be kept confidential.

With regard to the public interest, petitioner argues that because this relates to the expenditure of public funds, the public has an interest in its release. TriMet acknowledges this interest in a general sense, but rejoins that it has already satisfied that interest by providing petitioner with almost two years of data showing, on a monthly basis, TriMet's total fare revenue, revenue from open loop payments, and total fees paid to Wells Fargo by TriMet. On this record, and for the reasons articulated in *Baldwin*, we find the public interest would be harmed by release of the more detailed information requested by petitioner.

Given our determination that this material is exempt from disclosure under ORS 192.355(4) we need not address TriMet's alternative assertion that this formula is a trade secret under ORS 192.345(2).

**ORDER**

Accordingly, the petition is denied

Very truly yours,

A handwritten signature in black ink, appearing to read "Mike Schmidt", with a large, stylized flourish at the end.

MIKE SCHMIDT  
District Attorney  
Multnomah County, Oregon