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May 3, 2023

VIA EMAIL ONLY

Jason Sullenger
SullengJ@trimet.org

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

Re: Petition of Jason Sullenger seeking an unredacted version of his personnel file from TriMet

Dear Mr. Sullenger and Mr. Van Hagen:

Petitioner, Jason Sullenger, has petitioned this office pursuant to ORS 192.415 seeking an order directing TriMet to provide him with the records it redacted in response to his public records request for his own personnel file. TriMet has provided petitioner, a TriMet employee, with the bulk of the materials contained in his personnel file, but redacted a single email thread that it states should not have been in his personnel file in the first place. As to the legal basis for redacting it, TriMet cites ORS 192.355(1), the internal advisory exemption.

For the reasons discussed below we find some, but not all, of the redacted material fits within the scope of 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.

It is readily apparent on the face of the email thread at issue that the communications are internal to TriMet and are preliminary to final determination of action.

However, it is also readily apparent that the thread contains some purely factual material in addition to questions, advice, and recommendations. Factual material, by the terms of ORS

192.355, is not exempt from disclosure. The first email in the thread, sent on August 18, 2020 at 8:41 AM, outlines the facts underlying the request for advice. This email is not exempt.

The other four emails in the thread are non-factual and are “advisory” in that they are involve a back-and-forth discussion of recommendations for dealing with the particular situation presented. We move then to the second part of the test, which requires that TriMet show that the public interest in encouraging frank communication “clearly outweighs” the public interest in disclosure. Presented with a similar situation in *Petition of Khlafa*, MCDA PRO 21-15 (2021), we wrote:

The context of this request readily demonstrates that the interest in this information is personal in nature. This is not to say that a requestor may not use the public records law to seek matters of personal interest. However, an intense personal interest does not typically translate to a public interest that would support fee waivers or overriding the facial applicability of a conditional exemption. See, ATTORNEY GENERAL’S PUBLIC RECORDS AND MEETINGS MANUAL at p.33. It is sufficient here to say there is some interest in encouraging frank communication on this record and this clearly outweighs a personal interest in disclosure.

As in *Khlafa*, the interest of petitioner in his own personnel file is clearly personal, not public. As such, even assuming the public interest in encouraging frank communication in this instance is trivial, it will still clearly outweigh a non-existent public interest. The four remaining emails are exempt pursuant to ORS 192.355(1).

ORDER

Accordingly, the petition is granted in part. TriMet shall promptly release a copy of the records redacted consistent with this order. This release is subject to the payment of fees, if any, not to exceed those authorized by ORS 192.324(4)

Very truly yours,



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.

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