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May 6, 2010

Jacob Szeto
Oregon Politico
4850 SW Scholls Ferry Rd., Suite 103
Portland, OR 97225

Liz Goebel
Senior Deputy General Counsel
Legal Department
TriMet
012 SE 17th Avenue
Portland, OR 97202-3993

Re: Petition of Jacob Szeto received April 16, 2010 to disclose certain records of the Tri-County Metropolitan Transportation District of Oregon (TriMet)

Dear Mr. Szeto and Ms. Goebel:

On this public records petition, ORS 192.410 et. seq., petitioner Jacob Szeto requests the District Attorney to order TriMet to provide:

TriMet's initial proposal to the Amalgamated Transit Union (757) ("ATU") and ATU's initial proposal to TriMet in connection with the current negotiations for a new Working and Wage Agreement ("WWA")

Petitioner made his request to TriMet in an April 5, 2010 letter to TriMet Communications Director Mary Fetsch. In an undated (and unsigned) letter response, Ms. Fetsch denied petitioner's request citing ORS 192.502(1), Internal Advisory Communications. She referred to the Public Employee Collective Bargaining Act (PECBA), ORS 243.650-243.782, as establishing the collective bargaining process for TriMet and the ATU.

Petitioner rejected TriMet's position and argued in his petition that three of the four criteria for a public record to be exempt as internal advisory communications were not met. TriMet subsequently provided two responses through Senior Deputy General Counsel H. Elizabeth Goebel as well as the 2009 ground rules for collective bargaining negotiations. TriMet separately submitted the records in question for our confidential review.

Internal Advisory Communications

ORS 192.502(1) exempts:

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.

There are three criteria in dispute. There is no disagreement that the other requirement is present – the records cover other than purely factual materials.

1) A communication within a public body or between public bodies.

Petitioner maintains that the communication between TriMet and the ATU is an external communication between a public body and a private entity. Petitioner correctly points out that TriMet never directly addresses this argument. However, TriMet does describe in some detail the makeup of the negotiating team for the ATU. The nine-member Executive Board plus the current ATU officers are all TriMet employees.

There is no basis to conclude that the communication is other than between a public agency and its employees. As such, it is a communication within a public body, albeit for purposes of labor contract negotiations.

2) Of an advisory nature preliminary to any final agency action.

Petitioner distinguishes the “proposal” nature of the written negotiations from the exemption root word “advice” or recommendation. He argues that the “initial proposal fails to meet the criteria of being of an advisory nature.” TriMet does not meet petitioner’s definitional argument but states that “the initial proposals exchanged in the course of TriMet’s labor negotiations are advisory as to the relative positions of the negotiating parties.”

This office has never taken a narrow viewpoint of a memorandum, report, or position paper that can be fairly characterized as “frank and uninhibited advice or observations a public employee gives to a superior or associate.” Attorney General’s Public Records Manual, 2008, p. 59. The contract provisions outlined by TriMet and the ATU are clearly of an advisory nature preliminary to the final action of the TriMet Board of Directors.

3) The public interest in encouraging frank communication clearly outweighs the public interest in disclosure.

Petitioner correctly points out that TriMet “has the burden to show that the public interest is better served by exempting the records in question rather than disclosing them.” He asks why disclosure would hinder “frank communications” and points out that TriMet is merely speculating that disclosure would undermine good faith negotiations. Petitioner expresses concern over the high labor costs of a taxing entity such as TriMet and the alarming accumulation of retiree healthcare benefits. He argues that an examination of the negotiation documents would lead to a better understanding of how the public business is being conducted.

TriMet believes that granting access to the contract proposals would undermine the “free flow of information and concepts that TriMet needs for its efficient operations.” Senior Deputy Counsel General Goebel refers us to the provisions of PECBA, ORS 243.656, that “unresolved disputes in the public service are injurious to the public, the governmental agencies and public employees.”

TriMet lays out the statutory steps under PECBA which include a provision for the timely release of unsuccessful labor negotiations. First, there must be the delivery of initial proposals. Next there is mediation. The parties can then declare an impasse at which time the mediator publishes the final offers and cost summaries. There is a 30-day cooling off period followed by binding arbitration. A settlement agreement would be submitted to the TriMet Board of Directors at a public meeting for approval by resolution.

Petitioner takes the position that meaningful input from the public must take place before “the final offers have been put on the table, the parameters have been set and the final agreement will be a compromise.” This delayed disclosure of the negotiations must be weighed against the stated need for the confidential presentation of difficult labor contract proposals.

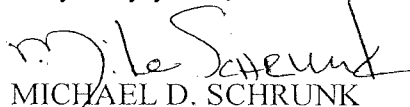
Petitioner himself has recognized the necessity of the “executive session” in labor negotiations under ORS 192.660(2)(d). “I think the intent of this law is to provide bargaining discussions that can be frank in manner, so that agreements can be easier reached, not to hide the details of the tentative agreement that may result.” (February 25, 2010 letter to this office regarding the Portland Public Schools and the Portland Association of Teachers tentative collective bargaining agreement.)

Labor negotiations are fractious, intense, emotional, draining, and extremely problematical of result. There is no greater need for frank communications between employers and employees than over the bargaining table. We agree with petitioner that disclosure of either a failed mediation or a tentative agreement must take place at a time when the public can evaluate the work of both parties involved. However, the release of initial proposals during PECBA mandated negotiation sessions is premature and not in the public interest.

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Accordingly, it is ordered that the petition of Jacob Szeto to disclose certain records of TriMet is denied.

Very truly yours,


MICHAEL D. SCHRUNK
District Attorney