



MICHAEL D. SCHRUNK, District Attorney for Multnomah County

600 County Courthouse • Portland, Oregon 97204-1193 • (503) 248-3162

June 8, 1999

Paul Mautner  
Deputy General Counsel  
Tri-Met  
Legal Department  
4012 SE 17th Avenue  
Portland, OR 97202

Bob Young  
Willamette Week  
822 SW 10th Avenue  
Portland, OR 97205

Re: Petition of Bob Young, for Willamette Week, dated  
May 26, 1999, to disclose certain records of Tri-Met

Dear Mr. Mautner and Mr. Young:

BACKGROUND

On this public records petition, ORS 192.410 et. seq., petitioner Bob Young, for Willamette Week, requests the District Attorney to order Tri-Met and its employees to produce a copy of the following records:

[D]ate-of-birth and Oregon Drivers License  
information for LIFT AND OMAP drivers.

Petitioner made his initial request on April 28, 1999 for identification information on a list of over 40 Tri-Met LIFT drivers. This request was clarified (and enlarged) in a May 17 letter which included a four-page list of Oregon Medical Assistance Program (OMAP) as well as LIFT drivers. We will assume that this second letter constitutes the definitive request.

Steve Johnson, Tri-Met Public Affairs, in a fax dated May 4, 1999, denied the petitioner's first request on the basis that supplying such information would "constitute an unreasonable invasion of privacy of our employees." Tri-Met Deputy General Counsel Paul Mautner has reiterated this position and cited the personal privacy exemption of ORS 192.502 (2) which exempts

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Information of a personal nature such as but not limited to that kept in a personal, medical or similar file, if the public disclosure thereof would constitute an unreasonable invasion of privacy, unless 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 [.] (See attached letter response dated June 3, 1999)

Mr. Mautner has taken the position that disclosure would be an unreasonable invasion of privacy and that petitioner has not established (by clear and convincing evidence) that the public interest requires disclosure. In addition, Mr. Mautner has noted in his response that Tri-Met does not have date-of-birth records for all, or even most, of its contractor's employees. He has pointed out that "those records are generally kept by those driver's respective employers."

#### DISCUSSION

##### 1. Personal Privacy Exemption ORS 192.502 (2)

Two questions must be answered as a threshold matter when considering a privacy claim under the Public Records Law:

- 1) whether the information is of a personal nature, and
- 2) whether disclosure unreasonably invades privacy.

Jordan v. Motor Vehicles Division, 308 Or 433, 781 P2d 1203 (1989).

Of course, the public records law is predominately a disclosure statute not a privacy statute. Consequently, public bodies for the most part are not obligated to claim exemptions from disclosure under this law, although they may do so. Even when the statutory exemption claim is left to the discretion of the public agency, a cautious exercise of the discretion may be needful.

There is no question that birth dates and Oregon driver's licenses numbers constitute information of a personal nature and that disclosure could be an invasion of privacy. However, Tri-Met has made no showing that the disclosure of any particular DOB or ODL would be an unreasonable invasion of that person's privacy.

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The Attorney General's Public Records Manual, 1997, page 47, cites Guard Publishing v. Lane County School Dist., 310 Or 32, 792 P2d 854 (1990) in stating:

Moreover, the information is not exempt absent an individualized justification for exemption. Thus, ORS 192.502(2) requires a public body to consider the merits of each request for nondisclosure on a case-by-case basis; a blanket policy of nondisclosure of public records does not comply with the Public Records Law.

Petitioner points out in his fax dated May 28 that the information is (to some degree) available to the public through the City of Portland's Bureau of Licenses. "Specifically many companies that provide service to OMAP passengers are approved for 'Specially Attended Transportation' permits by the City Council." Petitioner has determined that, as a consequence of this permit process, DOB's and ODL numbers for many OMAP drivers are on file with the City.

Jordan v. MVD, supra, goes on to note that a public interest may require disclosure in the particular instance. The exemption applies and may only be erased in favor of disclosure if either:

- 1) clear and convincing evidence of the public interest in disclosure of the record is produced, or
- 2) if the showing of unreasonable invasion is overcome.

Assuming arguendo that requiring Tri-Met to disclose the DOB's or ODL's of its drivers may be an unreasonable invasion of their privacy, petitioner has established sufficient public interest to warrant disclosure. Petitioner is investigating a possible violation of Tri-Met's own rules that disqualify anyone with a misdemeanor or felony conviction from driving for the agency. Apparently an OMAP driver (with a felony conviction on his record) pled guilty to raping a mentally disabled passenger. Petitioner seeks the identification information to ascertain if Tri-Met drivers in fact have criminal records.

Petitioner seeks the birth dates and drivers license numbers to assist in comparing the names of Tri-Met drivers with the criminal and traffic records in his possession. Whatever privacy concerns Tri-Met drivers might have in their birth and license information is clearly outweighed by the public interest in a thorough (and accurate) investigation of petitioner's suspicions.

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## 2. Public Record

Petitioner has limited his request for DOB's and ODL's to certain Tri-Met employees (LIFT operators), as well as contracted OMAP operators. The public records maintained by Tri-Met, either in personnel files or in contractual agreements, would be the likely repository for the information sought by petitioner. Tri-Met has indicated that it only has limited DOB records for all, or even most, of its contractors' employees.<sup>1</sup>


Public Records include any "writing" containing information relating to the public's business. ORS 192.410(4). The Attorney General's Public Records Manual, 1997, page 6, points out that records need not have been prepared originally by the public body to qualify as public records if such records are "owned, used, or retained" by the public body. ORS 192.410(4).

Tri-Met is only obligated under the Public Records Law to disclose the information contained within its records. If some of the information sought by petitioner is only available through the OMAP contractors, petitioner will have to seek such identification material through other sources than Tri-Met.

### ORDER

Accordingly, it is ordered that Tri-Met promptly disclose (to the extent available) the records sought in the above petition. Disclosure of the documents ordered is subject to payment of Tri-Met's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

  
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MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County

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<sup>1</sup> It may be that Tri-Met has found it unnecessary to have on file the dates of birth of its drivers (whether contractual or LIFT employees) or to ascertain the existence of valid Oregon Drivers Licenses for all personnel providing vital public transportation services.

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NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney 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 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such court action within 7 additional days thereafter.

99-04  
cc: Mary Fetsch, Tri-Met



TRI-COUNTY METROPOLITAN  
TRANSPORTATION DISTRICT OF OREGON

4012 S.E. 17TH AVENUE  
PORTLAND, OREGON 97202

June 3, 1999

John K. Hoover  
Deputy District Attorney  
600 County Courthouse  
Portland, Oregon 97204

VIA FAX (248-3643) AND U.S. MAIL

RE: Petition of Bob Young to Disclose Date of Birth Records

Dear Mr. Hoover:

This letter is in response to your request dated May 28, 1999 asking for Tri-Met's position with regard to Bob Young's petition for records.

Initially, it should be pointed out that Mr. Young's original request was for records showing the date of births (DOB) of Tri-Met's operators. That request was denied in Steve Johnson's message to Bob Young, which you have a copy of. Mr. Young now has filed an appeal with the DA's office for the DOB records for OMAP and LIFT operators, information that was not previously requested. OMAP and LIFT operators are not Tri-Met employees, but are employees of Tri-Met's contractors for those respective programs.

Assuming that the request was made to Tri-Met and that this appeal should be heard by your office, problems still remain in disclosing any DOB documents that Tri-Met may have. (Tri-Met wants to emphasize that it does not have DOB records for all, or even most, of its contractors' employees; those records are generally kept by those drivers' respective employers.) To the extent that Tri-Met has in its possession records of the OMAP and LIFT operators' DOB, they nevertheless should not be released to Mr. Young.

ORS 192.502(2) exempts from disclosure information of a personal nature if the disclosure of that information would constitute an unreasonable invasion of privacy. As the Attorney General has noted, this exemption "reflects a policy that persons working for or dealing with the government should not be subject to indiscriminate disclosure of personal information merely because of that association" (emphasis added). Since the exemption applies to the employees of Tri-Met's contractors, and because DOB information is undoubtedly of a personal nature, the question becomes whether its disclosure would be an unreasonable invasion of the individuals' privacy.

Regardless of the merits of Mr. Young's assertions that he would not harass those individuals, the proper analysis is whether, on an objective level, an "ordinary reasonable person" would deem the disclosure to be highly offensive; that is, that it would be an unreasonable invasion of privacy. The DOB of individuals meets this standard. It is much more personal and private than, say, the address of an individual. Generally speaking, individuals are not required to give their DOB in normal business transactions (unlike an address), again showing the personal nature of the information.

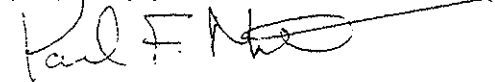
It is unclear whether Mr. Young agrees that such information, if disclosed, would constitute an unreasonable invasion of privacy, but he seems to believe so since he argues that in balancing the disclosure of such information against its non-disclosure, he has made a case for disclosure. Tri-Met disagrees. While it is true that the AG's manual states that "only where there is no overriding public interest in disclosure may the public body lawfully withhold the information," the (more revealing) prior sentence in the manual was not quoted by Mr. Young. It states:

Even if disclosure would constitute an unreasonable invasion of privacy, however, the public body also must determine whether the public interest by clear and convincing evidence requires disclosure in the particular instance." (emphasis added)

Clear and convincing evidence mandating disclosure is not present here. The DOB information appears to be needed to make it easier for Mr. Young to run criminal background checks on OMAP and LIFT operators. It is not that he cannot run such checks, only that it is easier for him to do so, and that the probability of mistaken identities for individuals of similar names is lessened by having their DOB. Mr. Young was provided with all of the names of the OMAP and LIFT operators that were in Tri-Met's possession. The ease with which Mr. Young might conduct background checks on those names by having their DOB is not, in itself, enough to overcome the clear and convincing evidence standard to release otherwise personal information.

Consequently, Tri-Met respectfully requests that the May 27, 1999 petition of Bob Young be denied in its entirety. If you have any questions or comments regarding the above, please do not hesitate to contact me.

Very truly yours,



Paul F. Mautner  
Deputy General Counsel  
Legal Services: (503) 238-5870  
[mautnerp@tri-met.org](mailto:mautnerp@tri-met.org)

c: Mr. Bob Young, Willamette Week  
Mary Fetsch