

February 7, 2023

Senator Kate Lieber
Senate Committee on Rules
Oregon State Legislature
900 Court St. NE
Salem, OR 97301

Re: SB 160 & SB 417

Chair Lieber and Members of the Committee:

TriMet is Oregon's largest regional transit provider, serving more than 1.6 million people across our 533-square mile service district in the tri-county Portland metro area. We write today to express our concerns with SB 160 and SB 417, both of which would create a presumption that all media requests are in the public interest and remove the incentive for requesters to collaborate with public agencies in identifying what information is specifically being requested.

As written, SB 160 and SB 417 statutorily deem public records requests from the news media to be in the public interest by default. This represents a significant departure from the instructions and best practices already outlined in the Oregon Attorney General's Public Records Manual, which covers 50 years of appellate opinions, Attorney General Opinions and District Attorney Opinions. The factors to be considered in a public interest fee waiver are clearly set forth in the AG's manual, which states that:

- "In determining whether the requester has established a sufficient public interest, relevant factors include the requester's identity, the purpose for which the requester intends to use the information, the character of the information, whether the requested information is already in the public domain, and whether the requester can demonstrate the ability to disseminate the information to the public";
- "A public body's fee-waiver decision should consider (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes that public interest, and (3) the extent to which a waiver would burden the public body" and;
- "Facts typically relevant to a fee-waiver decision include how narrowly tailored the request is to a matter of public interest; the time and expense needed to fulfill the request; the volume of the records requested; the need to segregate exempt from nonexempt materials; whether the fee was avoidable; and the ability of the requester to pay the fee."

The current "totality of the circumstances" approach outlined above encourages evaluation of the nature of the information and how it will be used, not just the identity of the requestor. This method of determining public interest allows for a more nuanced and fact-specific inquiry, as opposed to the black and white approach outlined in SB 160 and SB 417. By categorizing requests as being in the public interest by default, these bills remove the incentive for the media (and other special requesters) to work with the agency to identify what exactly is sought under the wider subject rubric. Additionally, SB 417 defines "news media" very broadly in a way that appears to include anyone with a blog or social media presence. SB 160 does not define "news media" at all.

Once a request is determined to be in the “public interest,” SB 417 requires fees to be waived unless the public agency can prove that the public interest is outweighed by substantial prejudice from the requester, or that the request will prevent the agency from being able to carry out its functions. SB 160 requires an automatic 40% fee reduction for “news media” without defining who qualifies as news media, and a 50%-100% fee reduction if the request is “narrowly tailored” regardless of how much work and cost even a “narrowly tailored” request could incur.

Like most agencies, TriMet reduces/waives fees when found to be in the public interest, by percentages greater and lesser than 40%, but it does so on a case by case basis based on the totality of the circumstances presented, in compliance with current law and best-practice guidance from the Attorney General. The charging of “actual costs” is currently the only way agencies have to get a very broad request narrowed or clarified, and by largely removing this ability, SB 160 and SB 417 remove the incentive for the media (and any other newly-identified categories of special requestors) to collaborate with the agency in identifying what information is specifically being requested.

The expense of making records/information available will not go away by virtue of requiring them to be waived; they will instead be paid for by reducing the functions and services the agencies are charged with supplying them. Of the 355 public records requests that TriMet completed in 2022, it granted automatic fee waivers to 194 of those requests and only denied two of the fee waiver requests it received. However, in many instances, the ability to assess the actual costs of retrieving public records allowed us to work with requesters to tailor their requests in ways that still provided the information they needed while allowing TriMet to minimize the cost of satisfying them. While the fees we charge for public records requests rarely recoup the cost to TriMet to retrieve them, they do allow us to devote more of our limited resources to delivering transit services to the communities we serve.

As a publicly-funded agency, TriMet is committed to being responsive and transparent with the public. We support SB 417’s direction to respond to public records requests in the least expensive manner reasonably possible, and we think it is important that public bodies explain the basis for the fees they charge to a requester. This can lead to productive discussions about what is being requested, and in turn, educate the requestor about the expense of making the particular information available. However, the public interest presumptions and fee limitations proposed by SB 160 or SB 417 would eliminate the tools we use to control the scope and cost of public records requests, potentially resulting in an exponential increase in both the volume and scope of requests that could be untenable for our current staff and resources.

For these reasons, TriMet urges you to oppose SB 160 and SB 417 in their current form. Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Myles Pengilly', is written over a light blue rectangular background.

Myles Pengilly
State Government Affairs Manager
TriMet