

**Stoll Berne Report on the Public
Records and Discovery Practices of the
Tri-County Metropolitan Transit District
of Oregon**

August 8, 2013

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	1
II.	INTRODUCTION AND GOALS OF REPORT	2
III.	BACKGROUND ON STOLL BERNE	3
IV.	METHODOLOGY AND SCOPE OF REVIEW	4
A.	Methodology	4
B.	Sources and Types of Material Reviewed	5
1.	Legal Sources	5
2.	Document Sources	6
3.	Employee Interviews	7
V.	BACKGROUND OF THE LAW AND POLICIES GOVERNING TRIMET’S PUBLIC RECORDS AND LITIGATION DISCOVERY OBLIGATIONS.....	8
A.	Public Records Law and Policies Governing TriMet	8
B.	The Document Production Responsibilities of Parties in Litigation	10
VI.	FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS.....	15
A.	Public Records Process	15
1.	Findings.....	15
2.	Conclusions.....	16
3.	Recommendations.....	20
B.	Litigation Discovery	22
1.	Findings.....	22
2.	Conclusions.....	25
3.	Recommendations.....	26

I. EXECUTIVE SUMMARY

On May 22, 2013, the Tri-County Metropolitan Transportation District of Oregon (“TriMet”) General Counsel contacted Stoll Stoll Berne Lokting & Shlachter PC (“Stoll Berne”) and requested that it prepare an outside report for TriMet’s Board of Directors. TriMet requested that Stoll Berne review TriMet’s practices for responding to public records requests and requests for documents in litigation. This report contains a number of findings, conclusions, and recommendations for your consideration. We highlight a number of them below for discussion at the board meeting:

- (1) TriMet has a professional and able Legal Department that works hard to assist the public in finding relevant documents and information and promotes transparency in the public records process.
- (2) TriMet has formalized the process for organizing and responding to public records requests and has made that process more efficient in the last two years. It still faces significant hurdles in managing TriMet’s vast volume of information and responding to the significantly increasing and broad public records requests it regularly receives.
- (3) TriMet needs to add more public records personnel and make a large investment in the infrastructure needed to manage, search, and produce documents and information in response to public records and litigation discovery requests. TriMet does not have a catalogue or document map of all of its documents and information. TriMet needs to invest further in cataloguing all of its documents and information so that it may better manage and produce documents and information in response to public records and discovery requests. TriMet also should invest in additional electronic discovery (“e-discovery”) tools necessary to search for, preserve, and produce electronic documents and information.

- (4) TriMet's litigation team is also professional and does not attempt to hide documents in the litigation discovery process. It has begun a better process to search for, preserve, and produce documents responsive to litigation discovery requests, but could improve this process further going forward. In particular, TriMet has not been able to keep up with developments in e-discovery, particularly in cases involving large potential damages and ones impacting agency-wide issues. The litigation team should stay informed of developments in e-discovery case law and the requirements to preserve and produce electronic information in litigation. TriMet's litigation team also would benefit substantially by the additional investment in the e-discovery tools noted above and additional personnel to help it locate and produce responsive documents.

II. INTRODUCTION AND GOALS OF REPORT

In May 2013, TriMet retained Stoll Berne to conduct an outside review of both TriMet's public records process and its practice in responding to document requests in litigation.

TriMet did not direct Stoll Berne towards any particular findings or conclusions. TriMet's General Counsel, Jana Toran, stated that her intent was to provide a report to TriMet's Board of Directors on Stoll Berne's conclusions. Stoll Berne was provided with unfettered access to TriMet's personnel and records.¹ Ms. Toran expressed that TriMet's Legal Department welcomed the outside review and she assisted Stoll Berne in making employees and documents available to complete the review. Members of TriMet's Legal Department made themselves available on relatively short notice despite having a very

¹ With respect to one request for operator email accounts, TriMet reviewed emails in advance to eliminate any personal information from the production. Because Stoll Berne was reviewing emails solely to determine the types of work-related email communications that operators may conduct, this was not a concern and had no impact on this report.

busy docket, including covering some large current litigation matters and on-going public records requests. Members of the IT Department were equally forthcoming with assistance.

The goal of this report is to examine how TriMet, particularly TriMet's Legal Department, is performing with respect to its obligations to produce documents in response to (1) public records requests and (2) discovery requests made in contested litigation. It is also intended to provide recommendations and suggest best practices for TriMet to follow with respect to future public records and litigation document requests.

III. BACKGROUND ON STOLL BERNE

Stoll Berne is a private law firm in Portland, Oregon whose lawyers have practiced in this community and throughout the United States for over thirty years. Stoll Berne's lawyers practice primarily in litigation, corporate, and real estate transactional matters. Stoll Berne's attorneys have worked on matters representing both plaintiffs and defendants in large and complex litigation. The firm also has represented public entities and, on occasion, represented individuals or entities that are adverse to public entities.² Through its work for public entities, Stoll Berne has developed substantial experience with the Oregon Public Records Law. Stoll Berne also has significant experience propounding and responding to requests for records and managing e-discovery issues in litigation.

² Stoll Berne previously represented a client in litigation against TriMet. That litigation concluded in July 2012. As part of this investigation, Stoll Berne instructed TriMet to ensure that Stoll Berne had no access to litigation files from that matter and Stoll Berne did not review any files related to that matter.

IV. METHODOLOGY AND SCOPE OF REVIEW

A. Methodology

To complete this project, Stoll Berne (1) reviewed the relevant law and external policies that either control or guide TriMet, (2) reviewed the formal and informal internal policies and practices that TriMet employees follow, and (3) assessed how TriMet Legal Department employees were performing with respect to those policies and practices.

In deciding how to undertake such a large task without creating an open-ended project that might require many months of time and unlimited financial resources, Stoll Berne had to decide how to best obtain the most relevant and helpful information. To that end, Stoll Berne interviewed the Legal Department employees most closely involved with the public records process and litigation discovery. It also interviewed key IT Department employees who have participated in e-discovery solutions or are familiar with TriMet's electronic database, software, and email systems.

Stoll Berne reviewed an Access Database listing every public records request made to TriMet between January 1, 2012 and July 12, 2013.³ It also reviewed a docket of all of TriMet's litigation. From the public records Access Database, Stoll Berne pulled and reviewed twenty-four recent public records request files (containing, generally, the request, TriMet's responses, and communications demonstrating TriMet's processing of each request) from a cross-section representing the different types of requests that the agency typically receives (e.g., citizen requests, media requests, and simple and more

³ Since early 2012, TriMet has implemented a number of changes to formalize its management of public records requests. Among other things, the agency began maintaining an Access Database of all public records requests beginning on January 1, 2012. Portions of the data collected in that database are used to update a Public Records Request Log, which is available to the public on TriMet's website and intended to provide requesters with status updates regarding requests. Other changes since 2012 include drafting of formal policies and greater use, when possible, of technology for purposes of submission of requests, and responding to and processing requests.

extensive inquiries). It also pulled and reviewed three recently closed litigation files. These files were randomly selected from files representing the type of litigation that TriMet's Legal Department is most often involved in, namely personal injury and employment related claims.⁴

B. Sources and Types of Material Reviewed

Stoll Berne reviewed and relied upon the following legal sources, policies, documents, and interviews in making the findings, conclusions, and recommendations in this report:

1. Legal Sources

To better understand the law that both controls and guides TriMet in the public records and litigation process, Stoll Berne reviewed the following legal sources and policies that may apply to TriMet in its public records and discovery obligations:

- ORS Chapter 192 (Oregon Public Records Law)
- Oregon Attorney General's Public Records and Meetings Manual (2011)
- A number of recent decisions of the Multnomah County District Attorney on Disputed Public Records Requests
- Oregon and federal procedural rules and case law applicable to public records and discovery obligations

⁴ It was not within the scope or budget of this report to review all or even most of the individual public records or litigation files and documents. There are hundreds of thousands, if not millions, of potentially relevant documents that could have been considered for this report. There may be issues evident in individual public records or litigation files that were not reviewed. As a general matter, however, Stoll Berne felt confident based on the interviews and documents that it reviewed that it had observed a pattern of practice that appeared representative of the conduct of the Legal Department with respect to public records and litigation discovery.

- Various Sedona Conference Guidelines and Commentary on Document Retention and Discovery, principally related to e-discovery.

2. Document Sources

As part of its review, Stoll Berne reviewed the following TriMet documents:

- Complete files for twenty-four public records requests
- Complete files for three recent (concluded) state-court cases⁵
- TriMet’s policies, schedules, procedures, and training materials relating to records management and retention
- TriMet materials used for responding to and tracking public records requests, including its public records request Access Database, templates, tables, forms, and related documents
- Sample litigation discovery requests and responses and sample templates for the same
- Forms used for tracking litigation discovery documents
- A sample “litigation hold” request
- TriMet’s organizational chart
- Email accounts for three TriMet operators and one field supervisor (personal emails withheld)
- A recent TriMet Request for Proposal for an outside contractor to develop a documents and records management system.

⁵ So as not to interfere with on-going litigation or risk any waiver of TriMet’s attorney-client privilege with respect to open litigation matters, Stoll Berne did not review or inquire into any currently open litigation matters.

3. Employee Interviews

As part of its review, Stoll Berne interviewed the following TriMet personnel who are significantly involved in the three areas of work that are the focus of this report: (1) Legal Department personnel who are significantly involved in the public records process; (2) Legal Department personnel who are heavily involved in the litigation discovery process; and (3) IT Department personnel who understand the agency's electronic data and have worked with the Legal Department with regard to e-discovery.

Legal Department

- Jana Toran, General Counsel
- Kim Sewell, Director of Legal Services
- Erik Van Hagen, TriMet Deputy General Counsel
- Britney Colton, TriMet Deputy General Counsel
- Kim Akimoto, Records Analyst (Public Records)
- Joanna Panza, Litigation Paralegal/Investigator
- Tina Lowe, Litigation Specialist, Labor (Past Public Records)

Information Technology Department

- Timothy McHugh, Chief Technology Officer
- Matthew Fouts, Manager of Technology Services
- Joanne Yi, Systems Engineer II (Email Administrator)

In addition, Stoll Berne conducted brief interviews with representatives from the Utah Transit District, San Diego Metropolitan Transit System, Regional Transportation District (Denver, Colorado), Lane Transit District (Oregon), and Orange County Transportation Authority, to learn about existing processes and practices in other similar agencies.

V. BACKGROUND OF THE LAW AND POLICIES GOVERNING TRIMET'S PUBLIC RECORDS AND LITIGATION DISCOVERY OBLIGATIONS

A. Public Records Law and Policies Governing TriMet

TriMet is a public body and custodian of public records and is subject to Oregon statutes that govern requests for public records. ORS 192.410 *et seq.* Those laws mandate that, in response to a public records request, TriMet must provide a copy of a public record that can be copied, or provide a reasonable opportunity to inspect or copy the public record. ORS 192.440(1). The law requires TriMet to establish written, publically-available procedures for making public records requests. Those procedures must include the name and address of a person to whom the requests may be sent and the amount of fees and the manner in which fees are calculated for responding to a request. ORS 192.440(7).

TriMet is permitted under Oregon law “to adopt reasonable rules necessary for the protection of the records and to prevent interference with the regular discharge of” TriMet’s business. ORS 192.430(2). For example, TriMet may require that all requests be submitted in writing. Attorney General’s Public Records and Meetings Manual (“A.G.’s Manual”), January 2011, pg. 8.⁶ When a request is submitted in writing, TriMet must respond “as soon as practicable and without undue delay.” ORS 192.440(2). TriMet may also request further information or clarification from the requesting party in order to help expedite its response. *Id.* TriMet is not required to *create* new public records, to explain or answer questions, or provide legal research about public records. A.G.’s Manual pg. 6.

⁶ The Attorney General’s Public Records and Meetings Manual is issued to explain how the public records laws work and to identify exceptions to those rules. The manual constitutes the opinion of the Attorney General; it is not law. However, the Manual provides valuable legal guidance to state agencies. The January 2011 version of the manual can be viewed at: www.doj.state.or.us/public_records/manual/pages/index.aspx.

TriMet's initial response to a request legally can take many forms depending on the specific request and TriMet's ability to determine whether it is in possession of the records, the estimated time and costs needed to process the request, and other factors. The response must acknowledge receipt of the request and include at least one of several statements specifically described in the applicable Oregon law. ORS 192.400(2).

TriMet must produce public records that are maintained in machine readable or electronic format in the format requested, if that format is available. Otherwise, TriMet must produce such documents in the format in which they are maintained. TriMet is not required to create new information using computer programs in order to extract data in a manner requested by the public. A.G.'s Manual pg. 6.

The law also allows TriMet to charge fees to a requester that are "reasonably calculated to reimburse" TriMet for the "actual cost" of making the records available. Those fees may include specific costs incurred for "summarizing, compiling or tailoring the public records, either in organization or media, to meet the person's request." Attorney fees incurred for review of the requested records, redaction of exempt information, or segregation of materials into exempt and nonexempt records may be included in the fee, although attorney time spent determining whether a record is exempt or nonexempt may not be included. A fee greater than \$25 may not be charged unless TriMet first gives an estimate of costs to the requester and the requester confirms that it wishes to proceed with the request.

A requester may seek a reduction or waiver of the fee and TriMet has discretion to allow such a request if it determines that the reduction or waiver "is in the public interest because making the record available primarily benefits the general public." ORS 192.440(5). A denial of a request for a fee reduction or waiver must be reasonable, and the requester can seek review of a denial from the Multnomah County District Attorney and, ultimately, the courts.

Two Oregon laws, ORS 192.501 and 192.502, set forth when a particular record may be conditionally exempt or exempt from disclosure. ORS 192.501 sets forth conditional exemptions from disclosure, specifically described in ORS 192.501(1)-(37). Those exemptions are conditional because TriMet is not required to disclose the records “unless the public interest requires disclosure in the particular instance.” Whether the particular record requires disclosure in the particular instance is a fact-specific inquiry that balances the public’s interest in disclosure against TriMet’s interest in nondisclosure. The presumption under Oregon law is in favor of disclosure. *In Defense of Animals v. Oregon Health Sciences University*, 199 Or App 160, 175-176 (2005). In some circumstances the requester’s purpose in seeking the disclosure of the records is relevant to whether the public interest requires disclosure. *Id.*

ORS 192.502 sets forth absolute exemptions from disclosure. ORS 192.502(1)-(38). Examples of these exemptions include (1) records subject to established privileges (such as the attorney-client privilege); (2) personal information such as medical information; (3) information submitted in confidence; and (4) sensitive business records. Many of these absolute exemptions have express exceptions or conditions that impact whether a requested record would be exempt from disclosure under the law.

In the event that TriMet declines to provide a requested record, the requesting party may seek review of that decision from the Multnomah County District Attorney. ORS 192.450-460.

B. The Document Production Responsibilities of Parties in Litigation

In addition to records requests from the public, TriMet often receives requests for documents from parties within the context of litigation. TriMet, as an operator of a large transit district with many bus and train lines, is often involved in litigation, more often appearing in state than federal court.

As a party to litigation, TriMet has duties in court to respond to an opposing party's reasonable requests for production of non-privileged, relevant documents and information. *See* Oregon Rule of Civil Procedure (ORCP) 36(B)(1) and 43 (regarding discovery and production of documents); Federal Rule of Civil Procedure (FRCP) 26(b) and 34 (same). Both the state and federal rules provide that documents and information include electronic documents and electronically stored information (ESI). ORCP 43(A), (E); FRCP 34(a)(1)(A), 34(b)(2)(D), (E).⁷

Both the state and federal rules also provide that a party may not be required to respond to requests for production of documents and information when there is an undue burden or expense that will be incurred in producing the responsive information. *See* ORCP 36 C (discussing undue burden of production generally); FRCP 26(b)(2)(B), (C) (discussing limitations on electronic discovery that is not accessible absent undue burden or cost and that court may weigh the burden or expense of discovery in relation to “the amount in controversy, the parties’ resources, and the importance of discovery in resolving the issues.”)

While both Oregon state and federal courts address electronic discovery issues, the published federal case law with respect to electronic discovery is far more developed, and the rules in state court are not as clearly laid out.⁸ Under the federal case law, once a party “reasonably anticipates litigation,” it must put in place a “litigation hold” to ensure the preservation of relevant documents, including electronic documents. *Zubulake v.*

⁷ The Oregon state court rules were specifically amended in 2010 to expressly include electronically stored information. *See* 2010 Amendments to the Oregon Rules of Civil Procedure, ORCP 43(A). The federal rules were amended to specifically address electronic discovery in December 2006.

⁸ *See* The Sedona Principles, Second Addition, Best Practices Recommendations and Principles for Addressing Electronic Document Production (June 2007), pg.9 (noting that “the volume of reported e-discovery decisions has been smaller in state courts” but is quickly changing, although then citing only one unpublished state court decision).

UBS Warburg LLC, 229 F.R.D. 422, 431 (S.D.N.Y. 2004) (“*Zubulake V*”).⁹ A claim notice served on TriMet would trigger the duty to preserve relevant documents from the key custodian. It might be triggered even earlier if a few key employees – or perhaps a single high-level employee or attorney who has all of the facts – conclude that there is a reasonable possibility of litigation arising from an event whose particular circumstances gave rise to a probable risk of litigation. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“*Zubulake IV*”) (noting that, the fact that a couple of employees thought about the possibility of litigation was not sufficient to trigger the duty to preserve, but it was triggered when the key employees reached the conclusion that there was a reasonable possibility of litigation). The issue of when the duty arises is fact specific, but it can be broadly stated that it does not apply to “the mere existence of a potential claim or the distant possibility of litigation.” *PacifiCorp v. Nw. Pipeline GP*, 879 F. Supp. 2d 1171, 1188 (D. Or. 2012), quoting *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed.Cir. 2011). It may arise when the litigation is “probable,” even if there are contingencies to it occurring, and the litigation does not have to be imminent. *PacifiCorp.*, 879 F. Supp 2d at 1188.

Even when the duty arises, a litigant is under no duty to keep and preserve every document, but the duty to preserve includes maintaining the relevant evidence of the key witnesses likely to have relevant information – “the ‘key players’ in the case.” *Zubulake IV*, 220 F.R.D. at 218. The litigant must preserve all relevant documents and all future-created relevant documents. *Id.* This may be achieved through several electronic means and there is not one electronic solution. *Id.* It does not require preserving back-up tapes only used for emergency purposes, but may require preserving back-ups of key

⁹ While the *Zubulake* series of opinions are from the Southern District of New York, they are widely acknowledged as significant opinions in the e-discovery field, cited in over 300 opinions, and have been relied on by the federal court in the District of Oregon. See e.g., *Schultz ex rel. Morris v. Wells Fargo Bank, Nat. Ass'n*, 2013 WL 1826575 (D. Or. Apr. 30, 2013) (relying on *Zubulake*).

employees *if* such tapes can be catalogued that way and there is no other way to preserve such key employee's electronic documents. *Id.*

The federal rules and persuasive commentary from judges and practitioners note that the extent of any electronic discovery required in a particular case must be balanced against the burdens and costs to the litigant. Thus, FRCP 26(b)(2)(B) provides that a party may not need to produce electronic discovery “from sources that the party identifies as not reasonably accessible because of undue burden or cost,” but the court may order it if the opposing litigant demonstrates good cause. As noted, both ORCP 36 and FRCP 26(b)(2)(C) discuss generally that courts may consider the undue burdens and expenses associated with any requested discovery. FRCP 26(b)(2)(C) specifically states that the burden of the discovery should be weighed against the likely benefit in light of the “needs of the case, the amount in controversy, the parties’ resources, the issues at stake in the action, and the importance of discovery in resolving the issues.”

Addressing these issues, persuasive commentators – judges and attorneys familiar with e-discovery issues and involved in the Sedona Conference¹⁰ – concluded that e-discovery burdens should be proportional to the amount in dispute and the nature of the case. *See* Sedona Conference’s 2007 Best Practices Recommendations on Proportionality; *see also* *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 364 (D. Md. 2008) (ordering parties to determine the range of damages in the case in order to

¹⁰ The Sedona Conference is a non-profit research and educational organization. It has established a working group on best practice recommendations for electronic document retention and production in civil discovery. *See* <https://thesedonaconference.org/wgs#WG1>. Its reports summarize e-discovery law and are widely cited by the courts, mostly the federal courts. The working group members include current and retired judges and experienced litigation attorneys. It should be noted that a substantial number of the attorneys work on large complex business litigation cases or come from large corporate law firms and corporations where e-discovery is both more common and likely more extensive than in many of the state court accident cases that TriMet typically participates in. Nevertheless, its findings are instructive and reflect best practices.

establish a reasonable and “workable” discovery budget). The Sedona Conference commentators later observed that “the burdens and costs of preserving potentially relevant [electronic] information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.” The Sedona Conference Principles on Proportionality, Conclusion 1 (Jan. 2013). In determining proportionality, the Sedona Conference also recommends considering “non-monetary factors” in the burden and benefit analysis as well as the use of “technologies to reduce cost and burden.” *Id.*, Conclusions 5-6.

In its 2007 Best Practices Recommendations on Proportionality, the Sedona Conference commentators also noted that such costs are not simply the cost of an information technology employee to copy a hard drive or email account:

Costs cannot be calculated solely in terms of the expense of computer technicians to retrieve the data but must factor in other litigation costs, including the interruption and disruption of routine business processes and the costs of reviewing the information. Moreover, burdens on information technology personnel and the resources required to review documents for relevance, privilege, confidentiality, and privacy should be considered in any calculus of whether to allow discovery, and, if so, under what terms. In addition, the non-monetary costs (such as the invasion of privacy rights, risks to business and legal confidences, and risks to privileges) should be considered. Evaluating the need to produce electronically stored information often requires that a balance be struck between the burdens and need for electronically stored information, taking into account the technological feasibility and realistic costs involved.

All of these costs may be factored into the proportionality analysis.

TriMet does not have an existing central system to easily preserve electronic documents across the agency from a central location, which currently makes electronic document preservation, which is in addition to any human efforts at preservation, more difficult and expensive. It also receives a large number of claims that involve minor property damages arising from vehicle accidents for which electronic mail records would not be particularly central to proving or disproving fault or damages in the accident.

As evident from the above, there is no hard and fast rule for TriMet to apply to determine the extent of electronic discovery necessary in any particular case and each case may require the exercise of judgment on a case-by-case basis. The extent of this electronic effort in any particular case should be analyzed in light of the size and nature of the case, the cooperation of witnesses who have already collected and retained documents for counsel, and the availability of hard copies of documents that have already been collected to the extent they duplicate the electronic records and data. A similar effort should be undertaken in the actual production of documents and information during litigation, both electronic and hard copy documents. Below in Section VI, B, 3 are some recommended practices for TriMet to follow.

VI. FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

A. Public Records Process

1. Findings

TriMet is a public body subject to Oregon's public records laws. TriMet has developed written policies and implements internal processes for managing public records requests.

TriMet employs a full-time Records Analyst who manages most public records requests. In general, public records requests are submitted electronically in writing, using a form developed by TriMet for public records requests. The public records request form is available on TriMet's website. Requests relating to potential claims against TriMet are forwarded to TriMet's Litigation Specialist for response. Requests relating to construction projects, environmental impact statements, contracts, procurement, and other such issues are forwarded to Capital Projects. Most other requests are managed by the Records Analyst.

Under the Records Analyst's guidance, the agency typically sends a form acknowledgment letter to the requester within a number of days. Requests are then generally forwarded to the agency custodian who has control over the requested records.

TriMet's Records Management Policy requires Executive Directors to designate a Records Coordinator within each Division. The Records Coordinator is responsible for assisting the Legal Department with responding to public records and litigation-related records requests; Executive Directors are ultimately responsible for implementing and enforcing Records Management Policies. As a practical matter, the Records Analyst or other employee managing the request identifies the employee(s) with knowledge of the requested records. When necessary, the Records Analyst or other employee managing the request works with division personnel to locate records and engages in follow up within the agency until the request has been satisfied and closed.

Once records are identified, TriMet is able to determine if there are costs associated with the request. A requester must typically advance payment and confirm that it wishes to proceed. TriMet waives costs when they are *de minimis* and in certain situations will grant a cost waiver. TriMet often works proactively with requesters to clarify requests. Some requests seek records subject to exemptions. Those determinations are made by legal counsel and subject to review by the Multnomah County District Attorney, as provided by Oregon law.

TriMet regularly updates a Public Records Request Log on its webpage. Between January 1, 2012 and July 15, 2013, TriMet received and processed 835 public records requests (including requests for records relating to claims and capital projects), an average of approximately 45 requests per month.

2. Conclusions

Based on our review, Stoll Berne concludes that TriMet's management of public records requests generally complies with legal standards. TriMet manages public records

requests efficiently and professionally. It does so despite our understanding that the number of requests submitted and the volume of records requested has significantly increased in recent years.¹¹ Indeed, the number of requests has increased in just the past two years. TriMet received 267 requests between January 1, 2012 and July 15, 2012 (and a total of 500 requests in 2012). During that same period in 2013, TriMet received 335 requests. Stoll Berne concludes that TriMet's employees generally treat public records requests as an important obligation and work diligently to process them quickly, professionally, and transparently.

TriMet manages records requests through appropriate processes to (1) receive requests, (2) deliver an initial acknowledgment to the requester, (3) clarify requests when needed, (4) locate records, (5) determine whether costs must be assessed, and (6) provide records.

Many aspects of TriMet's processes are worth noting because they advance efficiencies and expedite identification and delivery of records. For example, TriMet requires requesters to submit public records requests in writing and provides a form to the public for use in requesting records. That form contains all of the information required by law. TriMet also regularly accepts requests that are not submitted formally using that form. For example, on occasion TriMet receives requests by email. Some requests seek both information and records. Information requests are managed through a Public Information Officer. In order to expedite its response, in those instances TriMet proactively determines which requests are public records requests and will separately begin processing those requests. So that its process remains transparent, TriMet

¹¹ This report focuses on TriMet's processes for managing requests in general. We have not reviewed and do not reach any conclusion with regard to whether TriMet has, in response to any particular request, properly or improperly concluded that records are exempt from disclosure under the law. We also did not review and we reached no conclusions with regard to TriMet's compliance with record retention laws or policies.

communicates with the requester to provide information regarding how it will process the request.

Further, TriMet employees frequently work proactively with requesters and internal staff to help clarify intent or to focus requests in order to expeditiously locate records. The need to clarify a request can delay identifying the records sought by the requester. For example, the Records Analyst may understand the true intent of a request that is vague or incomplete, and will voluntarily identify for the requester known records available for inspection. Similarly, TriMet endeavors to expedite media requests submitted under deadlines by processing them in advance of less time-sensitive requests, when it is able to do so.

In addition, TriMet does not require or seek payment for many of the services associated with responding to requests, despite that the law allows it to do so.

Beginning in 2012, TriMet also made efforts to better utilize technology (such as on line submission of requests; use of a public records database; electronic forms; and electronic production of records) to improve efficiencies. There does not appear to be any routine dissatisfaction from the public regarding the overall management of public records requests.

Other aspects of TriMet's processes warrant additional resources or could be improved. TriMet has only one full-time staff person managing the majority of requests. Although TriMet's policies require that each Division assign a Records Coordinator, most public records requests are processed by the Records Analyst or other employee managing the request with assistance from the Division employee with the most knowledge regarding the particular records, often with little to no involvement or oversight from the Division Records Coordinator. Further, Division employees asked to assist with public records requests perform those duties in addition to regular job tasks and, as a result, public records requests are occasionally deferred or performed at the

expense of other work or after working hours. In short, in light of the increasing volume of requests, staff charged with managing requests is overburdened.

While many requests are “routine,” on occasion requests prove complex, voluminous, or otherwise more difficult to process. While TriMet works diligently to process all requests, some requests inevitably take longer to complete than others. On occasion, Division employees are either unable to attend to requests or fail to respond quickly. This creates a perception of general inefficiency or lack of responsiveness. Complex requests can involve multiple employees to research the location of records, develop cost estimates for time spent on different tasks by different employees in different departments, and determine whether exemptions apply. Processing that information so that the Records Analyst or other employee managing the request can present a cost estimate to the requester, separate from producing copies of the records themselves, can take several weeks and shift resources away from other requests. When documents are not readily available (for example, older documents stored in archives) or when third-party input is needed regarding potential exemptions (such as when trade secrets or confidentiality agreements are involved), requests can take longer to process.

Further still, on occasion, TriMet spends significant time and resources processing requests that are either delayed or abandoned by the requester. That point is demonstrated by some examples. One particularly complex request required TriMet to identify records in four different departments. TriMet provided an acknowledgment to the request within three business days, and spent considerable time developing a cost estimate, which it sent eight days later. However, the requester did not respond and did not pay the required fee for nearly two months. After payment of the fee, records were produced the next day. In another example, a requester sought all emails within TriMet’s systems for a period of two years, limited by certain phrases. TriMet provided an acknowledgment letter the next day and immediately began working with IT staff to run the searches. After spending substantial time attempting to run the searches, TriMet concluded that its systems would not allow it to accommodate the request and that

outside assistance was required. TriMet provided the requester with an update, informing him that it intended to work with an outside vendor to identify the requested records. After a vendor prepared a cost estimate, TriMet conveyed the information to the requester, who never responded.

Also, the fact that the agency has no centralized system for storing, organizing, and searching electronically stored information and documents creates certain inefficiencies. We understand that TriMet began a process to map out the vast number of documents and electronic information within its control prior to its retention of Stoll Berne for this report. Finally, TriMet does not have a consistent agency-wide practice for retention of electronic information in the custody of departing employees.

3. Recommendations

To ensure TriMet's on-going compliance with these important obligations, Stoll Berne recommends TriMet consider implementation of the following:

- Increase staffing within the Legal Department to assist in managing public records requests. TriMet's staff takes the agency's obligation to fulfill public records requests seriously. However, to continue servicing this public obligation the agency must address the issue of limited resources dedicated to those tasks, the increasing volume of requests made, the complexity of requests, and the fact that some requests take resources away from other demands and work obligations of employees.
- All Executive Directors, Records Coordinators, and other appropriate staff within the Divisions should receive training to emphasize the importance of public records requests, the agency's obligations to respond to requests, and the agency's general procedures for responding to requests. Annual reminders of these obligations should be communicated and training should

be provided to all new incoming Executive Directors and Records Coordinators.

- The Legal Department should ensure that Executive Directors and Records Coordinators are familiar with their Division's records management standards and protocol so that they can better assist, when needed, with locating records.
- All communications sent from the Records Analyst or other employee managing requests to Division employees requesting assistance with locating records should be copied to both the Executive Director and Records Coordinator, who will take ultimate responsibility for the request. (Already commenced, in part).¹² The Records Analyst or other employee managing the request should note a specific date by which a response is needed.
- The Legal Department and Records Analyst should review and update written policies and forms at least once per year.
- TriMet should continue to explore and implement an agency-wide records management system and/or protocol for managing documents. (Already commenced).
- TriMet should implement and enforce formal protocols for retaining electronic records in the possession of departing employees. All electronic files should be copied and stored by the Division Executive Director. The Executive Director and Records Coordinator should also be reminded that such information may be subject to public records requests.

¹² Where TriMet has already begun but perhaps not completed the process involved in any recommendation noted in this report, we have indicated that the process is "already commenced."

B. Litigation Discovery

1. Findings

As noted, TriMet is frequently involved in litigation, mostly as a defendant in cases arising from accidents or incidents relating to the operation of its bus and light-rail lines. Since 1970, TriMet has been involved in over 300 cases in state and federal trial courts in Oregon. *See* Exhibit A.

TriMet's Legal Department handles most of its cases in-house, particularly personal injury and employment cases. TriMet occasionally retains outside counsel when there are conflicts or in atypical cases.

While TriMet employs nine attorneys, including General Counsel, TriMet has only three attorneys who focus on litigating cases in court. TriMet also employs three paralegals/legal assistants that assist with litigation.

Generally, the litigation attorneys provide written objections to document requests and then offer, when relevant and not privileged, to produce either the requested documents or a specific subset of the requested documents and information. When a party makes a request for documents in litigation that TriMet considers overbroad, burdensome, or irrelevant, it objects in writing and then often counts on the opposing party's counsel to initiate a discussion to narrow the requests and discuss what the opposing party is specifically seeking. When an opposing party makes a specific request for a document at a deposition, TriMet, absent a legal objection, follows up to locate and produce those documents.

In routine cases—ones involving the type of issues that TriMet litigates frequently—TriMet's attorneys often have their paralegals draft the responses and objections to discovery responses. In new or more complex cases, TriMet attorneys often draft their own discovery responses. TriMet's attorneys always review and finalize the discovery responses.

In routine cases, TriMet's paralegals communicate directly with the custodians of the relevant documents. TriMet's attorneys and paralegals usually communicate with custodians by phone or email to discuss the relevant documents to obtain. In unusual or new cases, TriMet's attorneys may take the lead in searching for and following up in person with the custodians. The attorneys and paralegals generally do not supervise the custodian's searches.

TriMet's attorneys regularly search for and produce electronic information, such as electronic databases and electronic data and video, in their litigation cases. TriMet's attorneys do not believe that a system-wide search of electronic documents is necessary or appropriate in most of its routine accident and personal injury cases. Such a search would require great expense and time using the electronic tools currently maintained by TriMet. TriMet's attorneys have recently added a standard objection to discovery responses that TriMet will not undertake agency-wide searches for electronic data. TriMet's attorneys also do not believe that a search of electronic mail held by bus or train operators and supervisors is appropriate in most routine accident cases.

TriMet's Legal Department rarely engages its IT Department in searches for electronic documents. While TriMet does not regularly conduct a system-wide search of its electronic systems for relevant electronic documents and information, TriMet did such a search recently in response to an Order from United States District Court Judge Michael Mossman in the cases being litigated in *Hammel v. TriMet*, Case No. 3:12-cv-00706 (D. Or. 2012).¹³

¹³ *Hammel* is pending litigation. Stoll Berne did not review TriMet's files or specifically discuss that matter incident to its review, and Stoll Berne did not evaluate—and offers no opinion regarding—the specific conduct that led to Judge Mossman's Opinion and award of some of the opposing parties' attorney fees against TriMet. Although the overarching goal of Stoll Berne's review is to generally evaluate TriMet's processes, TriMet informed Stoll Berne that Judge Mossman's Order awarding attorney's fees against it influenced its decision to retain Stoll Berne to conduct this outside review.

TriMet's Legal Department generally delegates directly to the custodians in the other relevant departments the task of searching for hard-copy and electronic documents in their departments and computers.

TriMet does not have a document and data map of all of the documents and data that it has within all of its departments. It is starting to work on this project to organize its paper and electronic information and has issued a Request for Proposal for a consultant to advise on creating the infrastructure for document management.

TriMet currently does not have e-discovery tools that allow its IT Department to have a central way to easily search for and produce electronic documents across all of its servers and databases. TriMet has some tools that it can use to search across individual TriMet servers and databases to locate and produce documents, but they were not designed for this purpose and may be less reliable and very time consuming.

Prior to the order and attorney fee award issued by Judge Mossman in the *Hammel* case, TriMet's attorneys do not recall any attorney ever being admonished or sanctioned in a dispute over the discovery and production of documents in litigation.

TriMet recently started to send "litigation hold" notices – instructions to custodians to preserve documents and information and suspend any document destruction policies – on a regular basis to key custodians. TriMet's paralegal sends out these notices on behalf of the Director of Legal Services. TriMet does not regularly issue litigation hold letters to bus or train operators or supervisors in routine accident cases. TriMet also does not have electronic systems that are designed specifically to implement or enforce a litigation hold. It does have policies on public records document retention for employees to preserve hard copy and electronic documents. These policies, when regularly followed, would usually preserve the documents relevant to the litigation.

2. Conclusions

TriMet's Legal Department is staffed by a professional and competent group of lawyers and paralegals. The Legal Department, while vigorously representing the agency in litigation, does not appear to purposely hide documents from opposing parties in litigation. The attorneys from the General Counsel on down encourage a professional culture. Indeed, the fact that TriMet's General Counsel sought an outside review of its public records and litigation practice is evidence of that professional culture.

While TriMet has a professional Legal Department, TriMet, in general, and its Legal Department have not been able to keep up with the developments in e-discovery that would permit it to manage, preserve, and produce responsive electronic information in all necessary cases. Unsurprisingly today, vast amounts of information are transmitted through email and other electronic means of communication.

When requested, TriMet has produced relevant electronic information in its cases, including electronic databases, video, email, and data-packs from busses and trains. However, TriMet could improve how it communicates generally with opposing counsel in response to requests for documents, including discussing the scope of electronic data it will search for and produce and which data it considers too burdensome or expensive to produce. TriMet also needs better technology to assist it in storing, retrieving, and producing electronic information.

The current case law, discussed above, permits TriMet to object to producing electronic data when the cost of doing so is not proportional to the damages or issues at stake in the litigation. TriMet can reasonably object that an agency-wide search across all of TriMet's computer systems is not proportional to the typical bus or train accident case that does not involve substantial damages or implicate important, sustained, agency-wide issues. TriMet, however, can perform better in confirming that particular relevant witnesses and employees' email is searched on a custodian-by-custodian basis when the size or nature of the litigation demands it. In each case TriMet should determine,

whenever it can do so at a cost that is proportional to the issues at stake in the litigation, the likely relevant electronic information it has for potential production in litigation. In many cases, it may require some additional personnel or technology to preserve and produce the key custodians' electronic records.

Although it has been able to come up with solutions on a case-by-case basis, TriMet's IT Department has, to date, not had the software and electronic management tools necessary to search the entire scope of its electronic information in a cost-efficient manner. TriMet also does not currently have the software and electronic management tools to produce relevant electronic information in a cost-efficient manner. As discussed, we understand that TriMet is taking the initial steps to map its documents and electronic information and acquire better tools to manage, search, and produce electronic information.

TriMet has recently put in place an active process for sending out litigation hold letters. TriMet should continue to send litigation hold letters on a regular basis to key custodians of relevant documents. The key custodians may include operators and supervisors and, depending on the size and nature of the case, may involve preserving their relevant electronic documents in light of the fact that TriMet does not currently have access to electronic tools that can easily take a snap shot of existing electronic documents (even if there are public records archiving policies that should capture and preserve most documents).

3. Recommendations

To improve its litigation discovery practices, without sacrificing effective advocacy in the litigation process, Stoll Berne recommends the following actions, some of which TriMet has already undertaken:

- While TriMet has taken the initial step toward hiring a consultant to advise on how to manage its vast amounts of information, it should substantially

increase its investment in this process so it has a better and more efficient process for identifying, searching, and producing both electronic and hard copy documents in response to public records and litigation discovery requests.

- TriMet should continue to investigate and ultimately invest in additional software and e-discovery tools to help manage, preserve, search for, retrieve, and produce responsive electronic information when relevant and proportional to the case.
- In addition to the written discovery responses, TriMet's litigators should engage in early and extensive discussions with opposing counsel about the documents and information it will and will not produce absent court order.
- For most of the cases TriMet handles, it would be appropriate for TriMet's Legal Department to add a standard objection, which TriMet has begun to do, that it will not conduct an agency-wide electronic search of all email and electronic communications, but will, when responsive and relevant, search for the key custodian's emails depending on the size and nature of the case.
- In each case, TriMet should evaluate the need to preserve and search for electronic information and, where appropriate and proportional, coordinate with the IT Department to determine what additional electronic tools are needed, if any, to preserve and search for key custodians' documents. This should be done as a routine matter in large or complex cases or ones implicating agency-wide issues. This may include a targeted search for relevant documents across all key custodians or a separate preservation of all of the key custodians' electronic files.

- TriMet should continue to improve its process for regularly issuing litigation hold letters when TriMet first reasonably anticipates litigation. (Already commenced.) This may occur in some cases before TriMet receives a claim if it is reasonably apparent to key personnel from the nature of the incident and any statements made in connection with the incident that litigation is probable. If not already issued before, TriMet's Claims Department should issue litigation hold letters promptly after it receives a claim. Litigation hold letters should be promptly sent, at a minimum, to the key custodians and copied to their supervisors and department heads. The key custodians may, depending on the facts, include bus and train operators and their supervisors or other key personnel likely to have relevant information. After a litigation hold is issued, the Legal Department should follow up with the IT Department – in cases where it is involved – and directly with the custodians on a periodic basis to ensure that documents continue to be preserved.
- In addition to issuing litigation hold letters, TriMet should invest in and devote additional resources/personnel to actually collecting documents at earlier stages in matters that are reasonably likely to lead to litigation.
- In cases that do not involve a standard set of responsive documents, the Legal Department should be actively involved in interviewing custodians regarding the types of responsive documents that may exist and how they are stored and archived in individual employees' computers. In those cases, the Legal Department should be actively involved in supervising and directing custodians to search for documents.

- The Legal and IT Departments should conduct annual trainings for other departments on general responsibilities for preserving electronic and other documents in light of both the public records laws and specific litigation hold letters. The Legal Department also should stay informed of the latest e-discovery law and the IT Department should keep abreast of developments in e-discovery technology.

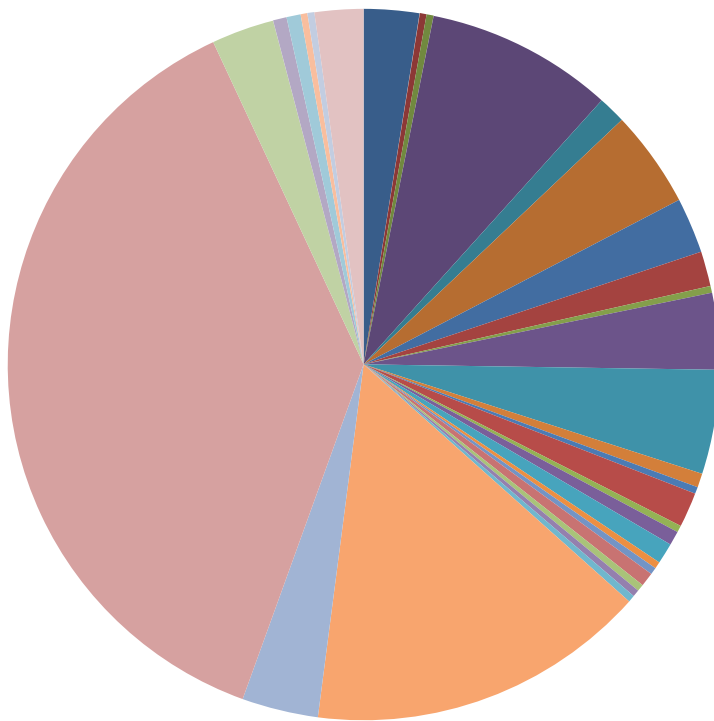


Scott A. Shorr
Managing Shareholder



Joshua L. Ross
Shareholder

Types of Cases



- Americans with Disabilities Act
- Ballot Title Challenge
- Banks and Banking/Finance
- Civil Rights
- Condemnation
- Contract
- Declaratory Judgment
- Discrimination
- Easement
- Eminent Domain
- Employment Discrimination
- Environmental Matters
- Fair Labor Standards Act
- Family and Medical Leave Act
- False Imprisonment
- Felony Theft - as Victim
- Fraud
- Injunctive Relief
- Intellectual Property - Patent
- Labor/Management Relations
- Land Condemnation
- Lien Foreclosure
- Money Action
- Negligence
- Other - Unknown
- Personal Injury
- Property Damange
- Racketeering (RICO) Act
- Remediation of Hazardous Substances
- Torts to Land
- Writ of Mandamus
- Wrongful Death

Type of case	Count
Americans with Disabilities Act	8
Ballot Title Challenge	1
Banks and Banking/Finance	1
Civil Rights	27
Condemnation	4
Contract	14
Declaratory Judgment	8
Discrimination	5
Easement	1
Eminent Domain	11
Employment Discrimination	15
Environmental Matters	2
Fair Labor Standards Act	1
Family and Medical Leave Act	5
False Imprisonment	1
Felony Theft - as Victim	2
Fraud	3
Injunctive Relief	1
Intellectual Property - Patent	1
Labor/Management Relations	2
Land Condemnation	1
Lien Foreclosure	1
Money Action	1
Negligence	49
Other - Unknown	11
Personal Injury	119
Property Damange	9
Racketeering (RICO) Act	2
Remediation of Hazardous Substances	2
Torts to Land	1
Writ of Mandamus	1
Wrongful Death	7
TOTAL	317