

Date: December 9, 2015
To: Board of Directors
From: Neil McFarlane *Neil McFarlane*
Subject: **RESOLUTION 15-12-71 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) ADOPTING A REVISED CRIMINAL RECORDS POLICY**

1. Purpose of Item

The purpose of this item is to request that the TriMet Board of Directors (“Board”) adopt a revised Criminal Records Policy.

2. Type of Agenda Item

- Initial Contract
- Contract Modification
- Other: Revised Criminal Records Policy

3. Reason for Board Action

In 1999, pursuant to a prior version of ORS 267.237, the TriMet Board passed Resolution 99-09-58, adopting criminal background check procedures and guidelines (“Criminal Records Policy” or “Policy”). The Policy applies only to bus operators and LIFT operators. ORS 267.237 was subsequently amended to allow TriMet to also conduct criminal background checks on applicants or employees whose positions provide them access to critical infrastructure or security sensitive facilities or information. However, ORS 267.237 requires that before TriMet can exercise this additional authority, the TriMet Board must adopt a resolution setting forth the guidelines by which the applicant or employee will be considered fit for employment. Resolution 15-12-71 would adopt a revised Policy establishing these guidelines as required by ORS 267.237.

4. Type of Action:

- Resolution
- Ordinance 1st Reading
- Ordinance 2nd Reading
- Other: _____

5. Background

In 2015, the Oregon legislature passed HB 3025, which makes it an unlawful employment practice for an employer to require a job applicant to disclose that he/she has a criminal conviction, either on an application or prior to an initial interview. Although an exception to this law permits TriMet to legally continue to ask for this information on employment applications for bus and LIFT operators, TriMet is proposing to discontinue this practice (“ban the box”) completely on all job applications. Instead, on a post-conditional offer,

pre-employment basis, TriMet will continue to conduct criminal background checks on its bus operators and LIFT operators pursuant to the Policy.

In addition to conducting criminal background checks on bus operators and LIFT operators, TriMet is proposing to exercise its authority under ORS 267.237 to conduct criminal background checks on applicants or employees who may have access to critical infrastructure or security sensitive facilities or information. The proposed revised Policy, which includes guidelines and procedures to implement this additional authority, is attached as Exhibit A. The list of job titles subject to the revised Policy will be maintained in Human Resources.

The following summarizes the most significant revisions to the Policy:

- 1) Those employees subject to the Policy now include applicants or employees who may have access to critical infrastructure or security sensitive facilities or information. The criminal background check will be performed on a post-conditional offer, pre-employment basis. For represented positions, the background check will be performed only on prospective employees (job applicants). For non-represented positions, the background check will be performed on both prospective employees (job applicants) and employees applying for a promotion or lateral move to a non-represented position (Page 1).
- 2) The current Policy states that failure to disclose a criminal conviction will result in disqualification. The revised Policy contains no such prohibition. Instead, the applicant or employee's fitness for employment will be based on the criminal background check, in addition to other hiring criteria.
- 3) The current Policy does not include offense levels for crimes committed against the State and Public Justice (ORS Chapter 162). The revised Policy includes those offense levels (Page 6).
- 4) The current Policy does not have any mechanism to determine the offense level for offenses that occur in other jurisdictions and have no exact equivalent in Oregon. The revised Policy provides that for offenses that occur in other jurisdictions that do not have an exact equivalent in Oregon, TriMet will make a determination on an appropriate comparable offense, in consultation with Human Resources and Legal (Page 6).
- 5) TriMet has updated contact information for applicants or employees who want to dispute the information received in a criminal background check (Page 9), and has provided contact information for applicants or employees who want to appeal TriMet's employment decision (Page 10).

6. Impact if Not Approved

If the Board does not pass the Resolution, TriMet will not be able to perform criminal background checks on applicants or employees who may have access to critical infrastructure or security sensitive facilities or information.

RESOLUTION 15-12-71

RESOLUTION OF THE TRI-COUNTY METROPOLITAN
TRANSPORTATION DISTRICT OF OREGON (TRIMET) ADOPTING A
REVISED CRIMINAL RECORDS POLICY

WHEREAS, the TriMet Board of Directors ("Board") originally adopted a Criminal Records Policy ("Policy") by Resolution 99-09-58, establishing guidelines and procedures allowing TriMet to conduct criminal background checks on bus operators and LIFT operators; and

WHEREAS, pursuant to ORS 267.237, TriMet is proposing to expand the category of applicants and employees subject to criminal background checks under the Policy to those who may have access to critical infrastructure or security sensitive facilities or information; and

WHEREAS, ORS 267.237 requires the TriMet Board to adopt a resolution amending the Policy in order for TriMet to include this additional category of applicants and employees; and

WHEREAS, the Policy set forth in Exhibit A to this Resolution establishes the guidelines and procedures concerning how TriMet will conduct criminal background checks and manage criminal background information for subject individuals, including the new category of applicants and employees; and

WHEREAS, the TriMet Board now desires to supersede in its entirety Resolution 99-09-58 by this Resolution 15-12-71;

NOW, THEREFORE, BE IT RESOLVED:

1. That the Criminal Records Policy ("Policy") is hereby revised and adopted as set forth in the attached and incorporated Exhibit A as amended by Board motion on December 9, 2015 (*).
2. That this Resolution 15-12-71 supersedes in its entirety Resolution 99-09-58, and the provisions of all other resolutions which pertain to the matters addressed herein.

Dated: December 9, 2015



Presiding Officer

Attest:


Recording Secretary

Approved as to Legal Sufficiency:


Legal Department

Resolution 15-12-71

Exhibit A

Criminal Records

TriMet will conduct Oregon State Police (OSP) and Federal Bureau of Investigation (FBI) criminal records checks on all: (1) applicants for employment with TriMet or current TriMet employees seeking to operate motor vehicles of the District or operate motor vehicles for the transportation of passengers in the public transportation system of the District; and (2) applicants for employment with TriMet whose position requires access to critical infrastructure or security sensitive facilities or information. ORS 267.237.

The category of applicants whose position requires access to critical infrastructure or security sensitive facilities or information includes those positions that have ~~unique~~ (*) access to TriMet's critical infrastructure or who have ~~unique~~ (*) access to security sensitive facilities or information that could compromise public safety, emergency preparedness, or continuity of service. The list of job titles that fall within this category is maintained in the Human Resources Department and is reviewed periodically by the Appeal Panel, as defined in this policy.

Similarly, TriMet will conduct Fair Credit Reporting Act (FCRA) checks, which may include criminal background information, on all applicants for employment with TriMet or current TriMet employees seeking a position where obtaining the person's credit history information is substantially job related and the position's essential function requires access to sensitive financial information.

For the criminal background checks, TriMet will make an individualized assessment of criminal conviction history that considers the nature of the crime, the facts that support the conviction or pending indictment or that indicate a false statement regarding the individual's criminal history, the relevancy of the crime or false statement to the position requirements, and any intervening relevant circumstances, discussed further below. On a post-conditional offer, pre-employment basis, TriMet will obtain these checks and conduct an individualized assessment after informing you that your past criminal conduct may exclude you from the position. If your past criminal conduct excludes you from the position, you have the right to appeal this determination, discussed further below.

ORS 267.237 requires criminal records checks and fingerprinting of individuals who operate motor vehicles for the public and who are employed by mass transit districts, transportation districts, or provide transit service under a contract. For individuals who will operate motor vehicles, screening applies to current employees, prospective employees (job applicants), and individuals under contract who transport the general public, including children, the elderly, individuals with disabilities, and clients eligible for Accessible Transportation Programs (ATP).

ORS 267.237 also allows TriMet to conduct criminal records checks and fingerprinting of individuals who may have access to critical infrastructure or security sensitive facilities or information. For individuals who have or will have access to critical infrastructure or security sensitive facilities or information, screening applies only as follows: (1) for represented positions, only to prospective employees (job applicants); or (2) for non-represented positions, to both prospective employees (job applicants) and employees applying for a promotion or lateral move to the non-represented position. Criminal background checks are in addition to other criteria, such as safe driving records.

This policy implements TriMet Board Resolutions 99-09-58, approved on September 22, 1999, and TriMet Board Resolution 15-12-71, approved on December 9, 2015, and establishes the guidelines for assessing the fitness of all persons employed who operate motor vehicles for the transportation of passengers in the public transportation system of the District, or who have access to critical infrastructure or security sensitive facilities or information. This policy covers current TriMet employees, prospective TriMet employees, and contract personnel whose jobs may require them to

transport persons other than TriMet employees, i.e., members of the public, or whose jobs require them to have access to critical infrastructure or security sensitive facilities or information. For those applicants for employment with TriMet or employees who are subject to FCRA checks, please contact the Human Resources department for further information.

This document defines how TriMet will screen current and prospective employees, and explains the mechanics of its program.

Compliance with ORS 267.237

ORS 267.237 requires that transit agencies enact a resolution that establishes certain rules of compliance and refines certain definitions contained in ORS 267.237. In consultation with the Department of State Police & affected provider groups, TriMet has adopted Resolutions 99-09-58 and 15-12-71 to implement ORS 267.237.

ORS 267.237 Requirements

- ✧ categories of individuals subject to criminal background checks

- ✧ information (including fingerprints) that will be required

- ✧ criteria for determining whether a person is fit to operate motor vehicles to transport agency passengers, or to have access to critical infrastructure or security sensitive facilities or information

TriMet's Policy and Procedures

All persons employed by, under contract with, or used by the district who operate motor vehicles to transport passengers for regular routes, ATP, or who may transport members of the public in their professional capacity, are subject to criminal records checks. In addition, all persons who will have access to critical infrastructure or security sensitive facilities or information.

Driver qualification requirements include current TriMet criteria and the requirements outlined in ORS 267.237 and defined in this document.

An individual who refuses a criminal records check or fingerprinting, or who makes false statements regarding the individual's criminal history is disqualified from TriMet employment, or from providing service for TriMet under contract, and, if applicable, that individual's employment will be terminated.

TriMet's hiring criteria includes, but is not limited to, customer service experience, driving record, work experience, drug screening, and criminal history.

Initial hiring is provisional, based on the above screening. The new employee or contractor receives and must complete extensive training and must demonstrate competency.

ORS 267.237 Requirements

- ✧ which services or entities are qualified to determine fitness for a position, service, license, certification, registration or employment

- ✧ employees authorized to make criminal record inquiries

- ✧ which crimes may be considered in reviewing criminal offender information

- ✧ when to request a nationwide criminal records check through the State Police

- ✧ development of an agency system to maintain criminal records check data

- ✧ when a previous criminal records check (information maintained by the district) may be used in lieu of a completely new check

TriMet's Policy and Procedures

TriMet is authorized to evaluate criminal records to determine fitness for employment or service pursuant to this policy. TriMet may contract this service through an intergovernmental agreement with the Oregon Department of Human Services or other suitable agency.

The Executive Director of Labor Relations and Human Resources has authorized the following staff positions to request criminal background checks, each of whom may then delegate to an authorized individual: Director of Business Programs, Human Resources Recruiter and Human Resources Business Partner, and the General Counsel.

Convictions for crimes with an impact upon public safety, property, or life, or other factors related to the person's position may disqualify the person from employment or from providing contracted service. For the full guidelines, see the *General Guidelines Crimes Affecting Fitness for Employment*, below. These include in-state and out-of-state convictions.

The district submits fingerprint cards, plus Oregon and FBI processing fees, to the Oregon State Police (OSP) for processing prior to the time a final employment decision is made.

To maintain criminal records check data and ensure the privacy of data within the system, the Executive Director of Labor Relations and Human Resources has determined that criminal history records check data is maintained in Human Resources or in ATP or in offsite storage.

The agency will **not** accept previous criminal records checks in lieu of a new check. For each new situation requiring a criminal background check, there will be a new check.

ORS 267.237 Requirements

TriMet's Policy and Procedures

The criminal records check occurs on two levels — state and national. The preliminary check is at the state level; the second check is national (FBI), with both results provided in about 7-10 business days. All hiring or approval to provide contract services is provisional until both checks have been completed and a fitness for hire determination has been made. TriMet observes these procedures as follows:

New employees or contract staff personnel are actively supervised at all times when they have direct or indirect contact with children, the elderly, or persons with disabilities until the preliminary check is received.

◇ conditions under which persons may participate in training, orientation, or work, pending completion of a criminal records check

- ▷ If the preliminary check shows no criminal background, the person may work, under continued active supervision, but regular employment or continued service provision by contract staff is contingent on a review of the national check and the requirements set forth in this policy.
- ▷ If there is any indication of criminal activity on the preliminary check, TriMet will not make the final hiring decision until the national criminal check has been completed. If the preliminary check has not disqualified the individual under this policy, and there are no other indications of criminal behavior, the employee or contract personnel may continue to work, under active supervision, with the final decision about employment to be made after the national check is received and a review is performed.

ORS 267.237 Requirements

TriMet's Policy and Procedures

✧ rights of notification and appeal

- ▷ Notification: A statement on the job application informs applicants that a criminal records check & fingerprints are required for employment to drive a vehicle for public transport, and for employment in a position that allows access to critical infrastructure or security sensitive facilities or information. The applicant signs a release authorizing the criminal check and fingerprinting.
- ▷ Notification & Appeal: A statement of individual rights and the appeals process is attached to the job application.
- ▷ Appeals: The appeals process outlined in this document is available to anyone to whom employment with TriMet or other entity covered by this policy is affected by or denied based on a criminal background.

Criminal Offenses that Affect Qualification for Employment or Contract Service

Criminal offenses that affect employment are convictions for crimes committed in any jurisdiction, including but not limited to those against persons, public safety, property, or life. Criminal offenses may disqualify the person from hire, continued employment, or providing services for specified periods of time. In determining fitness for hire, continued employment or provision of TriMet service, TriMet or its designee will consider:

- the nature of the crime
- the facts that support the conviction or pending indictment or that indicate a false statement
- the relevancy of the crime or false statement to the position requirements
- intervening circumstances which are relevant to the responsibilities and circumstances of the position (examples include the passage of time, age at time of commission, restitution, likelihood of recurrence, subsequent commission of another relevant crime, or an employer's recommendation)

For all crimes **except** offenses against person, the General Manager may consider mitigating circumstances or other information in making exceptions to the general guidelines set forth below.

General Guidelines are listed on the chart below. *Time Frame to Consider* (column 3) begins with the date of conviction.

General Guidelines Crimes Affecting Fitness for Employment

Type of Offense	Class of Offense	Time Frame to Consider
Offenses against persons*	Class A felony or unclassified crimes	forever
	Class B or C felony	15 years
	Class A, B or C misdemeanor	10 years
Offenses against property	Class A felony	15 years
	Class B or C felony	10 years
	Class A, B or C misdemeanor	5 years
Offenses involving fraud or deception	Class A, B, or C felony	10 years
	Class A, B or C misdemeanor	5 years
Offenses against public order; firearms and other weapons; racketeering	Class A felony	15 years
	Class B or C felony	10 years
	Class A, B or C misdemeanor	5 years
Offenses against public health, decency, and animals	Class A felony	15 years
	Class B or C felony	10 years
	Class A, B or C misdemeanor	5 years
Controlled substances, illegal drug cleanup, paraphernalia, precursors	Class A felony	15 years
	Class B or C felony	10 years
	Class A, B or C misdemeanor	5 years
Offenses against the State and Public Justice	Class A felony	15 years
	Class B or C felony	10 years
	Class A, B, or C misdemeanor or a violation	5 years
All other crimes under Oregon Revised Statutes (ORS)	Class A, B, or C felony	10 years
	Class A, B or C misdemeanor	5 years
	Traffic Crime	5 years

* For offenses marked by an asterisk, the General Manager will **not** make exceptions to the *General Guidelines* set forth above.

* For offenses that occur in other jurisdictions and do not have an exact equivalent, TriMet will make a determination on an appropriate comparable, in consultation with Human Resources and Legal.

Disclosure by TriMet Employees

All individuals employed by or under contract with TriMet who operate motor vehicles, as well as all individuals employed by TriMet who have access to critical infrastructure or security sensitive facilities or information must disclose to TriMet when they are convicted of a crime listed under *Criminal Offenses that Affect Qualification* not later than five calendar days after the guilty finding, plea, or conviction. Failure to voluntarily disclose by the 5th day may result in discipline up to and including termination.

NOTE: Pursuant to federal law and internal operating procedures, any TriMet employee in a CDL-required job classification is required to notify his/her supervisor or manager within 30 days of conviction for any traffic violation, except parking, no matter what type of vehicle was being driven. In addition, any TriMet employee in a CDL-required job classification is required to notify his/her supervisor or manager within one business day if his/her license is suspended, revoked, or cancelled, or if he/she is disqualified from driving for any reason.

Criminal Record Check Procedures

Driver applicants are required to have a full background check that includes a review of ten years of employment, ten years of driving records, and a criminal background check. Verification that a criminal background check has been completed is required for all drivers, whether they drive fixed routes or for ATP. Similarly, applicants who will have access to critical infrastructure or security sensitive facilities or information are required to have a full background check that includes a review of ten years of employment and a criminal background check.

TriMet's Executive Director of Labor Relations and Human Resources or designee approves the process & procedures for background reviews for all fixed route and ATP, as well as for all applicants who will have access to critical infrastructure or security sensitive facilities or information. The request for approval will be uniformly documented and submitted, with a central filing system maintained according to Human Resources protocol.

Procedures for obtaining & evaluating criminal background information are shown below:

Fixed Route Drivers

- 1 Applicants must provide the dates, cities, counties and states for any time they resided outside Oregon within the last ten years.
- 2 TriMet sends applicant information to one of the following sources for verification:
 - ▷ Oregon State Police (OSP) record checks
 - ▷ Oregon Judicial Information Network (OJIN) review
 - ▷ third party agencies (ADP Screening and Selection Services)
 - ▷ any federal, state or local law enforcement agency whose verification procedure will provide a comprehensive review of Oregon criminal records
- 3 TriMet prepares a fingerprint card and sends the card and processing fees to the Oregon State Police, who will check state criminal records.
- 4 Criminal records check verification is permanent, except fingerprint cards, which must be destroyed, with no copies kept.

Accessible Transportation Drivers – ATP

- 1 Applicants must provide a ten year employment history.
- 2 The ATP contractor may send applicant information to one of the following sources for verification:
 - ▷ Oregon State Police (OSP) record checks
 - ▷ Oregon Judicial Information Network (OJIN) review
 - ▷ any federal, state or local law enforcement agency whose verification procedure will provide a comprehensive review of Oregon criminal records
3. TriMet prepares a fingerprint card and sends the card and processing fees to the Oregon State Police, who will check state criminal records.
4. TriMet sends applicant information to one of the following sources for verification:
 - ▷ Oregon State Police (OSP) record checks
 - ▷ Oregon Judicial Information Network (OJIN) review
 - ▷ third party agencies (Avert or CIS)
 - ▷ any federal, state or local law enforcement agency whose verification procedure will provide a comprehensive review of Oregon criminal records
5. TriMet ATP personnel reviews the material received from OSP, FBI, and other sources, determines eligibility based upon TriMet established guidelines, and notifies contractor of the acceptability of the driver applicant.
6. TriMet ATP personnel maintain records for each driver applicant. The records include the documented record that absence of criminal background has been verified or that existing criminal background information has been reviewed. Criminal records check verification is permanent, except fingerprint cards, which must be destroyed, with no copies kept.

Employees with Access to Critical Infrastructure or Security Sensitive Facilities or Information

Applicants must provide the dates, cities, counties and states for any time they resided outside Oregon within the last ten years.

1. TriMet may send applicant information to one of the following sources for verification:
 - Oregon State Police (OSP) record checks
 - Oregon Judicial Information Network (OJIN) review
 - third party agencies (ADP Screening and Selection Services)
 - any federal, state or local law enforcement agency whose verification procedure will provide a comprehensive review of Oregon criminal records
2. TriMet prepares a fingerprint card and sends the card and processing fees to the Oregon State Police, who will check state criminal records.

Criminal records check verification is permanent, except fingerprint cards, which must be destroyed, with no copies kept.

Appeals

1) Disputing the Accuracy of Completeness of the Criminal Record Information

If the individual believes that criminal offender information is inaccurate or incomplete, he/she must request a review with the source of the information:

Oregon State Police Oregon State Police procedures adopted pursuant to ORS 181.555(3) the individual the right to inspect, challenge, and correct his/her own criminal offender information. A written request for review, with proof of identity (name, date of birth, and fingerprints) is required within 15 calendar days. Mail or deliver the request to:

Oregon State Police
Identification Services Section
3772 Portland Road, SE
Salem, OR 97303

The OSP division and the person will have a pre-hearing meeting to review information and determine the need for a hearing.

Federal Bureau of Investigation Under federal law, an individual can challenge the report, but cannot review or obtain a copy of the actual FBI record. To challenge the accuracy or completeness of any entry obtained from an FBI criminal records check, file a challenge with:

FBI Criminal Justice Information Services (CJIS) Division
Attn: Criminal History Analysis Team 1
1000 Custer Hollow Road
Clarksburg, WV, 26306

Consumer Reporting Agency (CRA) If criminal background information was obtained through a CRA, as disclosed in the letter of disqualification, the individual may contact that agency directly to question the information:

Oregon Judicial Information Network (OJIN) 1163 State Street Salem, OR 97310 Phone: (503) 986-5594	ADP-Screening & Selection Services PO Box 645177 Cincinnati, OH 45264-5177 Phone: 888-606-7868
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2) Disputing the Decision by TriMet

An applicant or employee who has been disqualified for a position or employment or licensing based on a criminal record has the right to appeal. The primary issue is fitness for employment as prescribed and intended by ORS 267.237. The balance of the evidence must weigh in favor of protecting our customers, many of whom are vulnerable Oregonians.

When employment or approval to provide TriMet service is denied based on information from a criminal record check, the individual receives a written notice of disqualification and a packet with instructions for appealing the decision.

When an employee is terminated, or employment (including by contract) is denied based on information from a criminal records check, the individual will receive a letter and a packet with instructions for appealing the decision.

The appeal process allows applicants for employment, current employees, or contract service providers to gather additional information that will help TriMet determine whether the disqualification from employment or from providing TriMet service based on criminal records check should stand.

A written appeal affords the person a reasonable opportunity to present relevant information, evidence and supporting statements. A written appeal must be submitted within ten calendar days after receiving the disqualification or termination letter. For purposes of this section, a person is deemed to have received the disqualification or termination letter within five calendar days after its deposit into U.S. regular, first-class mail. Failure to timely submit a written appeal constitutes waiver of the right to an appeal.

The procedure for appeal under the criminal records policy follows.

Procedures for Written Appeal

APPEAL PROCESS

Instructions for the appeal process accompany the letter of disqualification.

The appeal procedure is as follows:

- The appeal must be in writing and contain the name, address, telephone number of the person(s) requesting reconsideration, a statement of the reason(s) why it is believed that a termination or disqualification is invalid, and the signature of the requester. The appeal must be date stamped not later than ten calendar days after receiving written notice of termination or disqualification. For purposes of this section, a person is deemed to have received the termination or disqualification letter not later than five calendar days after its deposit into U.S. regular, first-class mail. If an appeal is not timely filed, the person will be deemed to have waived the right of appeal.

The individual may attach documents and other evidence to be included with the record and considered in deciding the appeal. Documentation must be complete before submitting it to the Human Resources Department. If documentation is incomplete, the appeal may not be processed. The appeal should be mailed to:

TriMet
Attn: Human Resources Department / Criminal Record Appeal
1800 SW First Ave., Ste. 300
Portland, Oregon 97201

- Upon timely receipt of an appeal, the Executive Director of Labor Relations and Human Resources, or designee, will review and research the appeal, and may consult with the Deputy District Attorney, TriMet police commander, the Executive Director of Safety and Security, and any other appropriate personnel.

- The Executive Director of Labor Relations and Human Resources, or designee, will then prepare a recommendation for the Appeal Panel, which may include the Executive Director of Transportation, the Executive Director of Maintenance, the General Counsel, or other appropriate personnel.
- The Appeal Panel will review the appeal material, including the recommendation from the Executive Director of Labor Relations and Human Resources, or designee, and submit a recommendation to the General Manager or designee.
- The General Manager or designee will then decide whether to adopt the recommendation from the Appeal Panel. The decision of the General Manager or designee is final.
- The Executive Director of Labor Relations and Human Resources, or designee, will then convey the final decision to the applicant or employee. TriMet will keep an electronic and paper record of the appeal, findings, and final decision.

NOTE: The General Manager may modify or waive any of these rules regarding an appeal in the interest of fairness or justice for good cause shown.

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