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Cc: "governor.kotek@oregon.gov" <governor.kotek@oregon.gov>
Date: Wednesday, July 08, 2026 3:31 PM UTC-07:00
Subject: R000879-070126 — Custodial Determination Under ORS 192.311(2)(b)

Dear Ms. Duke,

I am writing to document the statutory basis on which the closure of R000879-070126 was improper, and to place that analysis in the record alongside the Department's pending disposition.

The Department closed my request on the basis that it "is not the custodian" of the requested records, with a referral to the Oregon Parks and Recreation Department. That determination has a specific meaning under Oregon law, and the Department's use of it does not meet it.

ORS 192.311(2)(b) defines "custodian" as "[a] public body mandated, directly or indirectly, to create, maintain, care for or control a public record." The statute then provides a single exception: "Custodian" does not include a public body that has custody of a public record as an agent of another public body that is the custodian unless the public record is not otherwise available.

That exception is the only statutory route by which a public body in possession of a record may disclaim custody. It applies where the possessing body holds the record as an agent of the custodial body. It does not apply here.

My request sought the Department's own communications: correspondence between DAS and OPRD, and between DAS and the Office of the Governor, that reference me. In creating, sending, receiving, and maintaining its own correspondence, DAS acts as a principal on its own behalf, not as an agent holding another body's records. The agent exception in ORS 192.311(2)(b) is therefore unavailable, and DAS is the custodian of those records by the statute's plain definition.

The exception fails a second time as to the DAS Governor's office communications. Even where an agency relationship exists, ORS 192.311(2)(b) restores custodial status when the record "is not otherwise available." OPRD is not a party to correspondence between DAS and the Office of the Governor and cannot produce it. A referral to OPRD cannot make those records available, which places them squarely within the exception's own proviso.

The same analysis governs any OPRD-authored record in the Department's possession. ORS 192.329(2)(a) provides that a public body's response is complete when it provides access to or copies of all requested records "within the possession or custody of the public body" that it does not assert are exempt. The test is possession or custody, not authorship. A record prepared by OPRD and retained by DAS is a public record in DAS's possession and is responsive to a request directed to DAS.

I would also note that “not the custodian” is not an administrative convenience but a formal statutory representation. ORS 192.329(2)(d) provides that a response is complete only when the public body, “[t]o the extent that the public body is not the custodian of records that have been requested, provides a written statement to that effect.” The Department has made that representation as to records in its own possession, created in its own name, in its own systems. I ask the Department to identify the public body for which it claims to have been acting as agent, and the basis for that agency relationship, or to withdraw the determination.

Accordingly, the closure did not constitute a complete response under ORS 192.329(2). The lawful dispositions available to the Department remain those I identified in my letter requesting reopening:

1. Production of the responsive records;
2. Production with any claimed exemptions identified on a record-by-record basis, with the specific statutory authority for each; or
3. An express written statement that the Department holds no responsive records within these categories.

I would prefer to resolve this at your level. I am setting out this analysis now so that the record reflects it was available to the Department before any further disposition was made.

Thank you,

Robert Samuel White

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