

# GABRIEL D. DOUGHERTY

September 14, 2026

## **BY ELECTRONIC DELIVERY**

Robert Harris, Chair  
Susan Mandiberg, Vice Chair  
Oregon Public Defense Commission  
198 Commercial Street S.E., Suite 205  
Salem, Oregon 97301

### **RE: Public Comment before the September 16, 2026, Commission Meeting on the Agency's Update to Pending Rulemaking**

Dear Chair Harris and Vice Chair Mandiberg:

I write regarding the staff memorandum dated September 16, 2026, (hereinafter "staff memorandum"), on the update on agency rulemaking and the presiding officer's report dated September 16, 2026, (hereinafter "presiding officer's report"), on the rulemaking hearing.

I begin with what the staff memorandum resolves. Staff now state that the delegation of rulemaking authority is "intended to allow agency staff to coordinate the complicated processes, not to adopt, amend, or repeal the rules without board involvement," and that the rule will be revised accordingly. That is the position I urged in my August 5 comment. The rule as drafted vested a designated individual with "the authority to adopt, amend, repeal, or suspend administrative rules." Adoption is the exercise of rulemaking authority itself, not its coordination. Staff and I are now in agreement on that point, and the revision is warranted.

I write because the explanation the staff memorandum offers for how the rule came to say what it said does not withstand examination, and because the memorandum makes a second assertion, unsupported by any statute I can locate, that is the stated basis for pausing rules to which no comment was directed.

First, the staff memorandum states that ORS chapter 151 "use[s] the term 'commission', sometimes with a capital 'C' and sometimes with a lowercase 'c,'"; that this "has led to confusion in discussions around policy, authority, and other operational matters,"; and that it "is also likely what has led to the confusion around this proposed rulemaking." I have tabulated every use of the word in the 2025 edition of the chapter. The tabulation is enclosed hereto. Excluding uses of the agency's full name, the word appears 115 times: 112 in lowercase and 3 capitalized. Two of the three capitalized uses are the section heading of ORS 151.216 and its duplicate entry in the table of contents. The third and only capitalized use in operative text is ORS 151.211(3), which provides that "'Commission' means the Oregon Public Defense Commission." That is the definitional provision itself. Every one of the 112 remaining uses in the body of the chapter is lowercase.

There is therefore no alternation in the statute. There is a single defined term, capitalized where it is defined and rendered in lowercase consistently thereafter, which is the ordinary drafting convention of Oregon legislative counsel. The premise of the memorandum's explanation does not describe the statute.

Nor would the explanation assist the agency if the premise were sound. The only reading under which capitalization could bear on this rulemaking is one in which the lowercase term reaches agency staff while the capitalized term denotes the governing body, so that the rulemaking power in ORS 151.216(11) runs to the agency rather than to the commission. That reading is untenable on the face of the chapter. The lowercase term carries the whole of ORS 151.213, including the provisions governing the appointment of members, the duties of members, and the two-thirds vote by which members appoint the executive director. It appears in the heading of ORS 151.221, “[s]tatus of officers and employees of commission,” where it necessarily denotes the body that has officers and employees rather than the officers and employees themselves. And it appears in the eleven subsections of ORS 151.216 that precede subsection (11). The term cannot mean the staff in subsection (11) and the commission in the subsections above it.

The language at issue in the draft rule did not come from ORS chapter 151. It came from ORS 183.325, which describes the authority to “adopt, amend, repeal or suspend” rules as the subject of a delegation. The draft carried that description into the operative text. That is a drafting matter internal to the agency, and it is the matter that public comment identified.

Second, the staff memorandum states that “the Delegation of Rulemaking Authority must be adopted before other rules can be effective,” and on that basis pauses the entire package, including the model rules of procedure and the notice of intended rulemaking actions, neither of which drew any comment during the comment period. The presiding officer's report, dated September 16, 2026, confirms that the agency received one written comment addressed to OAR 404-025-0300. I am aware of no authority for the proposition and would ask that staff be requested to provide the citation. ORS 183.325 is *permissive*; it provides that a public body “*may*” delegate. Nothing in ORS chapter 183 conditions the effectiveness of a rule on the prior existence of a delegation. A rule adopted by majority vote of the commission may be filed under ORS 183.355 with no delegation in place, and the rules coordinator function under ORS 183.330 is a separate matter that requires none.

As to the model rules in particular, the statute points the other way. ORS 183.341(1) permits an agency to adopt all or part of the attorney general's model rules by reference without complying with the rulemaking procedures of ORS 183.335 with notice of adoption filed under ORS 183.355. Subsection (2) of § 341 directs that all agencies shall adopt rules of procedure to be used in the adoption of rules. Subsection (4) requires that those rules afford interested persons a reasonable opportunity to be notified of an intended rulemaking. And subsection (5) provides that no rule adopted after September 13, 1975, is valid unless adopted in substantial compliance with the rules adopted under subsection (4). The legislature thus did make the validity of the agency's rules depend on the prior adoption of another rule; that is, the procedural rules not a delegation.

The memorandum pauses the one rule ORS 183.341 makes a predicate in order to await one that no statute does.

If the proposition is unsupported, the two remaining rules should proceed on the schedule the commission approved.

Third, I note the posture in which this is occurring. The commission opened this rulemaking by motion on June 11, 2026. It now returns to the commission as an item captioned “update” in the staff memorandum with a recommendation of no action and no proposed motion. The presiding officer's report likewise states that no recommendation and no motion accompany it. The commission may therefore receive both documents and adjourn, and the rulemaking it opened by vote will have been neither continued nor closed by the body that opened it. I do not suggest that is anyone's design. I note only that the agenda as published permits it.

Finally, I note that the presiding officer's report, at pages 49 through 50 of the agenda, supplies the record the June 11, 2026, staff memorandum committed the agency to provide. It reports the notice filed with the Oregon Secretary of State on June 23, 2026; a public hearing held July 29; a comment period that ran from July 1 to August 10; and one written comment.

There is one question the presiding officer's report does not reach. The rulemaking is open. A notice is on file, a hearing has been held, and the comment period closed. The recommendation is that no action be taken and that staff return later for a vote to open rulemaking on the same three rules.

I would ask what becomes of the pending notice. If it is to be withdrawn, that is an action on a rulemaking the commission opened by vote, and the commission should be asked. If it is to remain on file while a second proceeding opens on the same rules, I would ask staff to identify the authority for two concurrent proceedings on OAR 404-025-0100, -0200, and -0300. And if the pending notice is simply to be abandoned, the July 29 hearing and the comment received before the period closed are abandoned with it. A member may move the rulemaking be continued or that the notice be withdrawn, and the body may decide.

I understand that the agency sought advice from the Oregon Department of Justice concerning this rule; that the advice was discussed at the rules advisory committee meeting on August 25, 2026; and that staff stated at that meeting that the opinion would be disclosed. The September 16 memorandum again characterizes that advice, stating that the revision will be made “[w]ith feedback from DOJ partners.” I would ask that the opinion be provided to the commission. The department's client in this matter is the commission, and the advice was rendered on a rulemaking the commission opened by its own vote. Whatever the agency's position on disclosure to the public, there is no basis on which the advice underlying a recommendation to suspend that rulemaking should be withheld from the body being asked to accept the recommendation.

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I respectfully request that any action on the June 23, 2026, notice (*e.g.*, withdrawal, abandonment, or the opening of a second proceeding on the same rules) be presented to the commission as an action item for its decision, and that the department of justice advice described above be provided to the commission before it is asked to act.

Thank you for your attention to this matter.

Very sincerely yours,

Gabe Dougherty

(GDD:rtd)

Enclosures:

- (1) [Uses of “Commission” and “commission” in ORS Chapter 151.](#)
- (2) [Letter dated August 5, 2026, \*re\* Public Comment on the Proposed Rule about the Delegation of Authority, by Gabe Dougherty.](#)

cc: Dr. Kenneth Sanchagrin, Executive Director  
Mara Hoaglin, Commission Secretary

Robert Harris  
Susan Mandiberg  
September 14, 2026  
Enclosure 1-1

## Uses of “Commission” and “commission” in ORS Chapter 151

Public Defenders; Counsel for Financially Eligible Persons | 2025 Edition

*Counted from [oregonlegislature.gov/bills\\_laws/ors/ors151.html](https://oregonlegislature.gov/bills_laws/ors/ors151.html)*

| Location                             | “Commission”<br>(excl. full name) | “commission” | Full agency name<br>(excluded) |
|--------------------------------------|-----------------------------------|--------------|--------------------------------|
| <b><i>Table of contents</i></b>      |                                   |              |                                |
| Series heading (all caps)            | 0                                 | 0            | 1                              |
| 151.213 entry                        | 0                                 | 0            | 1                              |
| 151.216 entry                        | 1                                 | 0            | 0                              |
| 151.221 entry                        | 0                                 | 1            | 0                              |
| 151.229 entry                        | 0                                 | 0            | 1                              |
| <b><i>Body text</i></b>              |                                   |              |                                |
| Series heading before 151.211        | 0                                 | 0            | 1                              |
| 151.211(1)                           | 0                                 | 1            | 1                              |
| 151.211(3)                           | 1                                 | 0            | 1                              |
| 151.213 heading                      | 0                                 | 0            | 1                              |
| 151.213(1)                           | 0                                 | 0            | 1                              |
| 151.213(2)(a)                        | 0                                 | 1            | 0                              |
| 151.213(2)(b) intro                  | 0                                 | 1            | 0                              |
| 151.213(2)(b)(C)                     | 0                                 | 1            | 0                              |
| 151.213(2)(b)(D)                     | 0                                 | 1            | 0                              |
| 151.213(2)(c) intro                  | 0                                 | 2            | 0                              |
| 151.213(2)(d)                        | 0                                 | 1            | 0                              |
| 151.213(3)                           | 0                                 | 1            | 0                              |
| 151.213(4)                           | 0                                 | 2            | 0                              |
| 151.213(6)(a) intro                  | 0                                 | 1            | 0                              |
| 151.213(6)(a)(B)                     | 0                                 | 1            | 0                              |
| 151.213(6)(b) intro                  | 0                                 | 1            | 0                              |
| 151.213(6)(b)(B)                     | 0                                 | 1            | 0                              |
| 151.213(7)                           | 0                                 | 1            | 0                              |
| 151.213(8)                           | 0                                 | 1            | 0                              |
| 151.213(9)(a)                        | 0                                 | 2            | 0                              |
| 151.213(9)(d)                        | 0                                 | 4            | 0                              |
| Note, Sec. 14(4), ch. 281 (2023)     | 0                                 | 0            | 1                              |
| Note, Sec. 102(2)(a), ch. 281 (2023) | 0                                 | 1            | 1                              |

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| Location                             | “Commission”<br>(excl. full name) | “commission” | Full agency name<br>(excluded) |
|--------------------------------------|-----------------------------------|--------------|--------------------------------|
| Note, Sec. 102(2)(b), ch. 281 (2023) | 0                                 | 0            | 1                              |
| 151.216 heading                      | 1                                 | 0            | 0                              |
| 151.216(1) intro                     | 0                                 | 0            | 1                              |
| 151.216(1)(e)                        | 0                                 | 1            | 0                              |
| 151.216(1)(g)                        | 0                                 | 1            | 0                              |
| 151.216(1)(j)                        | 0                                 | 2            | 0                              |
| 151.216(1)(L)                        | 0                                 | 1            | 0                              |
| 151.216(1)(m)                        | 0                                 | 3            | 0                              |
| 151.216(1)(q)                        | 0                                 | 1            | 0                              |
| 151.216(1)(s)                        | 0                                 | 2            | 0                              |
| 151.216(2) intro                     | 0                                 | 1            | 0                              |
| 151.216(2)(b)                        | 0                                 | 1            | 0                              |
| 151.216(2)(e)                        | 0                                 | 2            | 0                              |
| 151.216(2)(f)                        | 0                                 | 2            | 0                              |
| 151.216(3)                           | 0                                 | 2            | 0                              |
| 151.216(4)                           | 0                                 | 3            | 0                              |
| 151.216(5)(a)                        | 0                                 | 4            | 0                              |
| 151.216(5)(b)(A)                     | 0                                 | 1            | 0                              |
| 151.216(6)(a)                        | 0                                 | 1            | 0                              |
| 151.216(6)(b)                        | 0                                 | 1            | 0                              |
| 151.216(6)(c)                        | 0                                 | 1            | 0                              |
| 151.216(7)                           | 0                                 | 2            | 0                              |
| 151.216(8)                           | 0                                 | 2            | 0                              |
| 151.216(9)                           | 0                                 | 2            | 0                              |
| 151.216(10)                          | 0                                 | 3            | 0                              |
| 151.216(11)                          | 0                                 | 1            | 0                              |
| 151.219(1) intro                     | 0                                 | 0            | 1                              |
| 151.219(1)(a)                        | 0                                 | 1            | 0                              |
| 151.219(1)(b)                        | 0                                 | 1            | 0                              |
| 151.219(1)(c)                        | 0                                 | 1            | 0                              |
| 151.219(1)(d)                        | 0                                 | 1            | 0                              |
| 151.219(1)(e)                        | 0                                 | 2            | 0                              |
| 151.219(1)(g)                        | 0                                 | 1            | 0                              |

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| Location                               | “Commission”<br>(excl. full name) | “commission” | Full agency name<br>(excluded) |
|----------------------------------------|-----------------------------------|--------------|--------------------------------|
| 151.219(1)(h)                          | 0                                 | 1            | 0                              |
| 151.219(1)(i)                          | 0                                 | 1            | 0                              |
| 151.219(1)(j)                          | 0                                 | 1            | 0                              |
| 151.219(1)(k)                          | 0                                 | 2            | 0                              |
| 151.219(1)(L)                          | 0                                 | 4            | 0                              |
| 151.219(1)(m)                          | 0                                 | 1            | 0                              |
| 151.219(2)(a)                          | 0                                 | 1            | 0                              |
| 151.221 heading                        | 0                                 | 1            | 0                              |
| 151.221 text                           | 0                                 | 0            | 1                              |
| 151.223(1)                             | 0                                 | 1            | 1                              |
| 151.223(2)(d)                          | 0                                 | 2            | 0                              |
| 151.225(1) intro                       | 0                                 | 0            | 1                              |
| 151.225(2)(a)                          | 0                                 | 1            | 0                              |
| 151.225(2)(d)                          | 0                                 | 1            | 0                              |
| 151.225(3)                             | 0                                 | 2            | 0                              |
| 151.229 heading                        | 0                                 | 0            | 1                              |
| 151.229(1)                             | 0                                 | 1            | 2                              |
| 151.229(2)                             | 0                                 | 1            | 0                              |
| 151.229(3)                             | 0                                 | 2            | 0                              |
| 151.229(4)                             | 0                                 | 1            | 0                              |
| 151.235(1)(a)                          | 0                                 | 1            | 1                              |
| 151.235(4)                             | 0                                 | 0            | 1 + 1*                         |
| Note, Sec. 96(1)(a), ch. 281 (2023)    | 0                                 | 2            | 1                              |
| Note, Sec. 96(1)(b)                    | 0                                 | 1            | 0                              |
| Note, Sec. 96(1)(c)                    | 0                                 | 1            | 0                              |
| Note, Sec. 96(1)(d)                    | 0                                 | 1            | 0                              |
| Note, Sec. 96(2)(a)                    | 0                                 | 0            | 1                              |
| Note, Sec. 96(2)(b)                    | 0                                 | 0            | 1                              |
| Note, Sec. 98(1) intro, ch. 281 (2023) | 0                                 | 1            | 1                              |
| Note, Sec. 98(1)(a)                    | 0                                 | 1            | 0                              |
| Note, Sec. 98(1)(b)                    | 0                                 | 1            | 0                              |
| Note, Sec. 98(1)(d)                    | 0                                 | 1            | 0                              |
| Note, Sec. 98(2)                       | 0                                 | 1            | 0                              |

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| Location         | “Commission”<br>(excl. full name) | “commission” | Full agency name<br>(excluded) |
|------------------|-----------------------------------|--------------|--------------------------------|
| Note, Sec. 98(3) | 0                                 | 1            | 0                              |
| 151.485(1)       | 0                                 | 0            | 2                              |
| 151.485(2)       | 0                                 | 2            | 1                              |
| 151.487(1)       | 0                                 | 0            | 1                              |
| 151.487(4)       | 0                                 | 1            | 0                              |
| 151.493(2)       | 0                                 | 0            | 1                              |
| 151.505(2)       | 0                                 | 1            | 1                              |
| <b>TOTAL</b>     | <b>3</b>                          | <b>112</b>   | <b>31 (+1*)</b>                |

\* The additional full name use in 151.235(4) is “Oregon Criminal Justice Commission,” a different agency. All other excluded uses are “Oregon Public Defense Commission,” including the all-caps series headings and the titles that embed the name (e.g. “Oregon Public Defense Commission Lawyer Trust Account”).

Notes: Possessives (“the commission’s website”) are counted as uses of the word; there are five, at 151.216(1)(s), (7) and (8) and Sec. 98(1) intro and (1)(b). Table of contents entries duplicate the section headings; excluding them gives 2 uppercase and 111 lowercase.

Sections with no uses: 151.010, 151.489, 151.491, 151.495, 151.497, and the repealed or renumbered stubs. Grand total of all forms: 147.

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## **GABRIEL D. DOUGHERTY**

August 5, 2026

### **BY ELECTRONIC DELIVERY**

Dacia Smith  
Rules Coordinator  
Oregon Public Defense Commission  
198 Commercial Street S.E., Suite 205  
Salem, Oregon 97301

### **RE: Public Comment on the Proposed Rule about the Delegation of Authority**

Dear Ms. Smith:

I submit this comment on the proposed rule governing delegation of rulemaking authority within the Oregon Public Defense Commission. The rule purports to authorize a delegation of rulemaking authority that the commission has no power to make. It should be withdrawn.

ORS 151.216(11) vests rulemaking authority in the commission. The grant runs to the commission as a body. The legislature's choice to vest the authority in the commission rather than in an officer is a substantive choice that establishes how rulemaking power conferred on this body is to be exercised. That is, collectively, through the procedures by which a public body acts with the procedural protections of public meetings law and the accountability of a body whose members are appointed and confirmed for that purpose.

ORS 183.325 permits an agency to delegate its rulemaking authority to an officer or employee "unless otherwise provided by law." The specific statutory grant in ORS 151.216(11) is law that provides otherwise. The commission cannot delegate to any officer or employee what the legislature vested in the commission specifically as a body. The general permission in ORS 183.325 does not override the expressly granted power and authority, and no other provision in the commission's enabling legislation authorized the further delegation that the proposed rule contemplated.

The proposed rule treats the executive director, the deputy director, and the chair of the commission as sources of delegated authority, providing that a member or employee is vested with rulemaking authority upon signature by one of those three individuals. None of the three holds rulemaking authority that could be delegated. The executive director and deputy director are agency officials whose statutory powers do not include rulemaking. *See* ORS 151.219. The chair is a single member of the commission and cannot exercise that body's authority unilaterally. The proposed rule purports to authorize delegations by individuals who do not hold the authority to

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delegate, of a power that the commission itself does not hold the power to pass along to any other person or agency.

The proposed rule, however, is not consistent with the principle staff has conceded. The rule's text provides that a designated individual "is vested with the authority to *adopt*, amend, repeal, or suspend administrative rules [emphasis added]." Adoption is the exercise of rulemaking authority itself. Vesting that authority in a designated individual is the precise act the agency acknowledges it cannot perform. The staff memorandum dated June 11, 2026, characterizes the rule's purpose as the coordination of rulemaking activities and filing of adopted rules with the secretary of state. Those are ministerial functions that occur downstream of the exercise of rulemaking authority. The text of the rule is not limited to those functions. It vests adoption authority itself, which is the function staff concede cannot be delegated.

Staff may respond that the rule, having been adopted by the commission acting as a body, is itself the commission's exercise of delegation authority and that individual signature is merely the operational mechanism through which the body's delegation is carried into effect. That response does not save the rule. The commission cannot delegate to anyone what cannot be lawfully delegated in the first place. A rule purporting to authorize what the statute does not permit does not become a valid delegation by virtue of having been adopted as a rule.

I respectfully request that the proposed rule be withdrawn. Rulemaking under ORS 151.216(11) must be conducted by the commission as a body, exercising its authority through the procedures applicable to public bodies. If the commission wishes to streamline its rulemaking operations, the path is to use other deliberative instruments available to public bodies, such as consent agenda, standing committees with reporting obligations, or a rulemaking calendar, rather than to attempt a delegation that the statute does not authorize.

Very sincerely yours,

Gabe Dougherty

cc: Dr. Kenneth Sanchagrin, Executive Director