GABRIEL D. DOUGHERTY

May 17, 2026

VIA ELECTRONIC DELIVERY

Robert Harris
Chair, Oregon Public Defense Commission (*via email at* info@opdc.state.or.us)
198 Commercial Street S.E.
Salem, Oregon 97301

RE: Public Comment on the Proposed Audit Committee Charter and Bylaw Amendments

Dear Chair Harris:

I write in opposition to the proposed audit committee charter and the associated bylaw amendments. I urge the commission to reject the proposal and direct the Governance, Policy, and Standards Subcommittee to return with a structure that preserves both commission oversight of the internal audit function and public visibility into it.

The proposal fails on three independent grounds. Each is sufficient on its own. Together, they describe a structure that would remove the internal audit function from public and commission view at the moment the agency is under sustained legislative, media, and public scrutiny.

The Secretary of State's recommended standard. On August 29, 2018, the Secretary of State's Audits Division issued Report 2018-25, *Opportunities Exist to Increase the Impact of State Agency Internal Audit Functions*. The report identified the structural elements of an independent internal audit function: a dual-reporting structure; a formal written charter; the inclusion of a governing board or commission member, where applicable; and a majority of external or independent audit committee members. It specifically identified committees with more than two-thirds internal as undermining the dual-reporting relationship and threatening independence. It identified the seating of an internal auditor's administrative reporting line—here, the executive director—on the audit committee as a direct threat to independence. It cited evidence that committees with greater independence from the audited entity are less likely to be sanctioned for poor or fraudulent practices, more likely to implement audit recommendations, and less likely to experience internal control problems.

The proposed OPDC charter departs from each of these elements. The committee would be approximately 83% agency management. The executive director would sit on the committee. The two non-management seats—namely, one external or independent auditor and one commission member—are a minority by design. The same 2018 report identified the Public Defense Services Commission, OPDC's predecessor, as an agency that appeared to meet the criteria for an internal audit function since at least 2003 without establishing one. The agency has finally stood up the function. This proposal would structure it as the inverse of what the Secretary of State has recommended as the standard for independence.

The public meetings exemption. OAR 199-050-0010(1)(b) subjects advisory bodies that

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recommend to a public body to public meetings law. Subsection (2)(b) carves out a narrow exception for bodies appointed by an individual public official who has the authority to act on the recommendations and is not required to pass them on unchanged to a public body. This proposal does not fit in either condition.

It does not fit the "authority to act" condition. The chief audit executive is a professional internal auditor whose role depends, by design and by professional standard, on *not* having unilateral authority to act. He identifies risks and recommends; management decides whether to implement; he then audits whether implementation occurred. A CAE with independent decisional authority over his own recommendations is not functioning as an internal auditor. The exemption was written for officials whose decisional authority terminates the advisory chain such as agency heads convening internal advisors. It does not fit an official whose entire institutional role depends on the absence of such authority. The proposal's own description of the committee as "the independent body to whom the Chief Audit Executive functionally reports" confirms this: an official a body advises under § (2)(b) cannot simultaneously be an official the same body oversees.

It does not fit the "not required to pass" condition either. Section II.B of the bylaws, which this proposal preserves, requires an internal audit report be presented to the commission annually. The annual report is presumably the downstream product of the committee's work such as the audit plan it shaped, the findings it reviewed, the management responses it advised on. Routing the work through the executive director before it reaches the commission does not change that the commission is the structural recipient of the committee's output. The § (2)(b) exemption requires both conditions. This proposal satisfies neither.

The OMD template. The accompanying memorandum explains that the draft is modeled on the Oregon Military Department's audit committee charter. The military department is run by the adjutant general—a single director—with independent management authority; an audit committee that advises the director and falls within the § (2)(b) exemption fits that architecture. This commission is not structured that way. It is a gubernatorially appointed, Senate-confirmed governing body created by the legislature to provide public oversight of Oregon's public defense system. Importing a department-style audit structure into a commission-governed agency does not relocate the audit function. It removes it from the body the legislature created to oversee it.

The pattern. Each failure above is sufficient on its own. The combination should give the commission pause. The proposal borrows a template that does not fit OPDC's governance; relies on a public meetings exemption for which it does not cleanly qualify; and structures the audit function as the inverse of what the state's auditor has recommended as the standard for independence. The inclusion of a single commission member on the committee does not cure this; the charter imposes no obligation on that member to report to the commission; and the rest of the commission is excluded from the closed-session meetings. All three structural choices point in the same direction, and that direction is away from public and commission visibility into the agency's internal audit function. The commission and agency are operating under sustained scrutiny from the legislature, the media, and the public. This is the wrong moment to contract that visibility.

A concrete example. The chief audit executive began an internal audit of preauthorized

expenses in November 2024. As of today, the commission has not received his report. Under the current structure, that delay is at least visible. Under the proposed structure, the commission would have no reliable mechanism for knowing whether such an audit is underway, stalled, redirected, or closed without findings. A governance structure that makes it harder for the commission to track the status of an audit in which it has a clear interest is the wrong structure.

I ask the commission to:

(1) reject the proposed charter and bylaw amendments as drafted;

(2) direct the subcommittee to return with a revised proposal that (a) preserves a reporting line from the audit committee to the commission, (b) retains a majority of external or independent audit committee members consistent with Secretary of State Report 2018-25, and (c) does not rely on the § (2)(b) exemption while preserving the bylaws' section II.B annual report requirement; and

(3) in the interim, order a status report from the chief audit executive on all open internal audits, including the preauthorized expenses audit initiated in November 2024.

The integrity of public defense in Oregon depends in part on the commission's ability to see, and the public's ability to view, how the agency identifies and addresses its own risks. The proposed charter narrows both. I implore the commission to return it to the subcommittee for further consideration.

Very sincerely yours,

Gabe Dougherty

cc: Dr. Kenneth Sanchagrin, Executive Director

Public Testimony and Notice of Administrative Deficiencies

To: Voting and Non-Voting Members of the Oregon Public Defense Commission
From: Arlen Porter Smith
Date: June 9, 2026
Subject: Public Comment Regarding Systemic Failures to Implement Executive Branch Transition Requirements, Procedural Omissions in Proposed Chapter 404 Rules, and Non-Compliance with State Procurement and Personnel Law.

I. Opening Statement / Oral Testimony Outline

Chair Harris and Members of the Commission:

My name is Arlen Porter Smith. I submit this testimony to alert the Commission to a profound, systemic institutional failure and an apparent total lack of awareness of what the statutory transition from the Judicial Branch to an Executive Branch state agency actually entails for the Commission.

The purposes of the Commission's meeting in Bend today seem to be both to review proposed text for the Commission's “initial” venture into state agency administrative rulemaking and to, for lack of a better word, “hobnob” with potential defense services contractors at the Oregon Association of Defense Counsel (OADC) convention. If this portrayal is anything close to correct my first comment is have you ever heard the story of the Emperor's New Clothes? If my portrayal is not correct of deficient in some way my alternative comment is, have you every heard the story of the Emperor's New Clothes?

I refer to the cautionary tale of the Emperor's New Clothes because irrespective of what the Commission perceives itself as doing and having done, the reality is that the Commission is publicly displaying itself in a very unbecoming manner. From merely the perspective of

public optics, the Commission is out there in Bend sucking up to potential contract service providers in a cozy retreat setting when the Commission should be forming the ground rules for its operation in the public rulemaking process.

The legislature delegates rulemaking authority to state agencies because it is not practical for that body to legislate every minute detail for every situation. State agencies have been delegated specific areas of law making authority because it is the only practical way to govern. That delegated authority has well defined limits, processes, and procedural safeguards in place. I do not see much in the way of evidence that the Commission understands its duties and obligations as a newly minted state agency.

The creation or transition into a state agency generally happens in one of two ways either an entirely new whole cloth creation or a division of an existing state agency is spun off to become its own free standing department. The latter is closest to what has happened with the Commission. The difference is that the Commission has a very different history and has become a state agency bearing a great deal of its own prior baggage. There are multiple things that should be touched on. I am going to keep it simple and begin with the issue of rulemaking.

As a matter of course, the Commission was assigned Chapter 404 in the OARC by the Oregon Secretary of State in January of 2025. Here eighteen months later, the Commission has yet to take either the preliminary steps necessary to engage in rulemaking nor technically engaged in any formal rulemaking[1]. That unfortunately does not mean that the Commission has not actually enacted any rules without compliance with the OAPA.

In July of 2025 the Commission adopted formal “Attorney Qualification Standards” for contract service providers. This was technically an

1 The urgency that may come across in this testimony should not be construed as a suggestion that the Commission should consider engaging in temporary emergency rulemaking. That power is intended to be only used when external factors cause an immediate need for action, not as a bandaid for when an agency shoots itself in the foot.

exercise in rulemaking without compliance with required rulemaking procedure. The very fact that the Commission did this in this manner is somewhat disturbing. The cart has not merely been placed in front of the cart, the cart is thousands of miles away from the barn where the horse has yet to be born. Add to this metaphor the following facts.

The Commission has traveled to Bend for what appears to be partly to meet and greet potential contract service providers, yet leadership remains completely blind to the reality that state agency contracting rules, procurement standards, and personnel oversight are *vastly different* from anything this body has previously dealt with. The Commission cannot operate an Executive Branch agency on informal Judicial Branch habits.

If the Commission were to vote to open rulemaking without taking the preliminary steps to engage the formal rulemaking process, whatever it will be enacting will be procedurally non-compliant and facially vulnerable to immediate legal challenge under **ORS 183.400**. You cannot legally codify *how* you will give notice of rules until you have first legally codified *who* has the authority to issue them, *who* is in charge of the agency's records, and *how* the public can interface with that authority.

Furthermore, this testimony serves as my formal notice: I have already filed a facial challenge to the Commission's **Attorney Qualification Standards** which were promulgated last July without compliance with required rulemaking procedure. Any attempt by the Commission to enforce those improperly promulgated standards will be met by my immediately seeking and securing a court-ordered stay of enforcement.

The Commission needs to get its house in order before it proceeds further. No amount of geographic public relations can substitute for formal administrative compliance. True institutional transparency does not mean holding a meeting at a Bend resort to cuddle with prospective service providers; it means establishing a legally valid state agency framework under the laws applicable to the Executive

Branch. Towards that end please allow me to provide an outline of some preliminary steps that I would suggest are necessary.

II. Specific Substantive Deficiencies

1. Failure to Comply with the Mandates of ORS 183.330(1)

Under **ORS 183.330(1)**, every state agency is under a strict, non-discretionary statutory command to adopt rules that ensure public accessibility. Specifically, the statute mandates that the agency shall:

- *(a) Adopt as a rule a description of its organization, stating the general course and method of its operations and the methods whereby the public may obtain information, make submissions or requests.*
- *(b) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available.*
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The draft of rule **OAR 404-025-0120** I have seen entirely ignores subsection (1)(a). It lists notification timelines borrowed from ORS 183.335, but it fails to provide a description of the Commission's executive branch organization. It fails to identify the apex structural authority (who is "in charge"), and it fails to outline the precise course, division, or method of operations.

2. The Procurement and Provider Contracting Trap

The Commission has traveled to Bend under the banner of regional provider outreach, yet, as I have said, and now reiterate, leadership remains functionally unaware that state agency contracting rules and procurement standards are vastly different from anything this body has previously dealt with under the Judicial Branch.

By operating in an administrative vacuum without first establishing a codified organizational rule, the Commission has no established framework to legally execute or manage public defense service contracts under Executive Branch procurement laws. You cannot

negotiate or contract with field providers if your internal structural positions and delegated authorities do not legally exist under the state's central administrative codes.

3. Fatal Ambiguity and Omission regarding the "Rules Coordinator" Mandate

Section (2) of the draft text states that a person desiring to join the interested parties mailing list *"must make such a request in writing either on the agency's website or to the agency's rules coordinator."* This creates a procedural flaw under both **ORS 183.330(2)** and **ORS 183.333**:

- **The Rule Does Not Identify the Official Holder:** While the agency may have internally processed a ministerial delegation form to obtain OARD database credentials, the administrative rule itself fails to identify, title, or provide contact protocols for the designated Rules Coordinator.
- **The Rule Fails to State "How" or "Where":** The draft instructs the public to write to the "rules coordinator" but provides no physical mailing address, no specific division name, and no definitive contact endpoint within the text. An administrative rule governing public access cannot rely on invisible internal assignments; the mechanism for public submission must be explicitly transparent within the codified OAR text.

4. Violation of the Governor's March 2026 Executive Accountability Framework

In March 2026, the Governor issued a directive regarding state agency accountability that bears directly on this situation. This directive mandates clear lines of authority, verified workforce metrics, and formal organizational charting across all executive agencies, backed by DAS oversight.

Not only has the Commission failed to codify its organizational structure under ORS 183.330(1), but it has also glossed over the reality that filling these designated positions is no longer an internal,

informal Judicial Branch exercise. As an Executive Branch entity bound by **ORS Chapter 240** and DAS CHRO recruitment policies, the Commission cannot legally operationalize a "Rules Coordinator" or any other specific slot mentioned in draft 404-025-0120 without clear legislative FTE mapping and documented, open competitive merit screening.

By skipping the baseline organizational rules, the agency is blinding the public to the legal validity of the very personnel slots it purports to give authority to, placing it in direct violation of the Governor's March accountability benchmarks.

III. Remedial Recommendations for the Commission

To cure these deficiencies and insulate Chapter 404 from procedural invalidation, the Commission must execute the following measures before advancing any further business:

1. **Table the Current Draft:** Decline to vote to open rulemaking on the current draft text of OAR 404-025-0120.
2. **Draft a Dedicated Organizational Rule:** Insert a new rule within Division 025 (e.g., OAR 404-025-0100) explicitly titled *"Description of Organization and Public Access."* This rule must explicitly state the executive leadership structure of the Commission, define who is in charge of final agency action, and lay out clear, operational methods for the public to obtain information.
3. **Explicitly Codify the Rules Coordinator Contact Channel:** Rewrite Section (2) of the procedural draft to replace vague references with explicit, functional text designating the exact title, physical mailing address, and central agency email account dedicated to receiving rulemaking and petition submissions under ORS 183.333.
4. **Cease Enforcement of Unpromulgated Policies:** Halt any current or planned enforcement of the Attorney Qualification Standards issued last July until they have been subjected to the mandatory, formal rulemaking procedures dictated by the Oregon Administrative Procedures Act.

Before I began writing this testimony I had a couple of long engaging conversations with the Betsy Imholt the current Director of the Department of Administrative Services related to the Commission's situation. What is disturbing about that fact is that the Commission should have made that contact and had those conversations long before I did.

There is much much more that merits discussion here. However, I am going to close this written testimony at this point and hope that the Commission will mull over what has been said here. I may attend the meeting on the 11th via Zoom but I also may be unable to do so due to a schedule conflict. In any event, I am more than willing to answer any questions the Commission or any member of the Commission may have related to the transition problems.

Sincerely yours,

Arlen Smith