ELLEN F. ROSENBLUM
ATTORNEY GENERAL

FREDERICK M. BOSS
DEPUTY ATTORNEY GENERAL

DEPARTMENT OF JUSTICE

Justice Building
1162 Court Street NE
Salem, Oregon 97301-4096
Telephone: (503) 378-6002

April 5, 2021

VIA EMAIL ONLY: dsupham58@gmail.com

Donald Scott Upham
3906 SW Altadena Avenue
Portland, OR 97239

Re: Petition for Public Records Disclosure Order
Oregon Department of Justice
DOJ File No.: 137043-137043

Dear Mr. Upham:

This letter is the Attorney General's response to your petition for disclosure under the Oregon Public Records Law, ORS 192.311 to 192.478. Your petition asks the Attorney General to review the Department of Justice's (DOJ) purported denial of a March 30, 2020 records request. For the following reasons, we respectfully dismiss your petition.

The Public Records Law confers a right to inspect any public record of a public body in Oregon, subject to certain exemptions and limitations. *See* ORS 192.314(1). Upon receipt of a written request to inspect a public record, an agency shall within five business days confirm whether it is, is not, or is uncertain whether it is the custodian of the requested record. *See* ORS 192.324(2). An agency "that is the custodian" of the requested records shall give the requester a copy of the record or provide a reasonable opportunity to inspect or copy the record. ORS 192.324(1); *see also* ORS 192.318(1) (duty to furnish records if a function of the custodian). "Custodian" means "[a] public body mandated, directly or indirectly, to create, maintain, care for or control a public record. '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." ORS 192.311(2)(b). Any person denied the right to inspect or to receive a copy of a public record of a state agency may petition the Attorney General for review. ORS 192.411(1).

Your March 30, 2020 request to DOJ sought "any records relating to efforts by Dr. Rosilez's department to investigate my client Russell Zysett *** including but not limited to any records created or received by Lincoln Hathaway, Dr. Rosilez or any other employee."

Because Dr. Rosilez is the Executive Director of the Teacher Standards and Practice Commission (TSPC) and Lincoln Hathaway is a TSPC employee, DOJ understood your request to be seeking TSPC records. As required by ORS 192.324(2), DOJ informed you on March 30, 2020 that it was not the custodian of the records you requested and advised you to submit your request to TSPC. You replied on March 31, 2020 that your request "could have simply been forwarded. It was sent to the AG because the AG represents Rosilez, Hathaway and the TSPC."

Although your March 31, 2020 response confirmed DOJ's understanding that you were seeking TSPC records, your petition characterizes DOJ's March 30, 2020 response as a "denial" of your request. We disagree with your characterization. As DOJ is not "mandated, directly or indirectly, to create, maintain, care for or control" TSPC's records, it is not a custodian of the records you requested. ORS 192.311(2)(b). And as a non-custodian, DOJ had no duty or authority under the Public Records Law to process your request on behalf of TSPC. *See* ORS 192.324(1) and ORS 192.318(1). It follows that DOJ could not have "denied" your request within the meaning of ORS 192.411(1). We therefore dismiss your petition because there has been no denial for us to review.

We also note that even if DOJ had been the custodian of the records you requested and had denied your request, we still would be required to dismiss your petition. This is because the Attorney General is not permitted to review the denial of a public records request when the records are in the custody of an elected official. *See* ORS 192.427 (if the record is in the custody of an elected official, then no petition to require disclosure may be filed with, or considered by, the Attorney General); ORS 180.020 (Attorney General is an elected official); ORS 180.210 (Attorney General is the head of DOJ); and ORS 180.140 (Attorney General is responsible for the acts of assistants); *see also* Public Records Order, March 14, 2019, Friedman.

For the foregoing reasons, we respectfully dismiss your petition.

Sincerely,



Frederick M. Boss
Deputy Attorney General

FMB:pjn