

December 20, 2023

Governor Tina Kotek
Office of the Governor
900 Court Street, Suite 254
Salem, OR 97301

Re: Corrections Ombudsperson Position – Conflict Concerns

Dear Governor Kotek,

We are writing to express our significant concerns about the conflicts that currently exist with the Corrections Ombudsperson position—a position that is integral to ensuring the safe, legal, and humane treatment of adults in the care and custody of the State. We have concerns that the Corrections Ombudsperson could be obstructed by the Oregon Department of Justice (ODOJ) legal counsel, discouraged from taking an adverse tone or position against the Oregon Department of Corrections (ODOC), and encouraged to refrain from substantially investigating ODOC at risk or fear of discharge from the position. The Corrections Ombudsperson’s statutory powers would be hamstrung by these actions, effectively reducing a position intended to provide robust oversight of ODOC to an impotent position.

The Corrections Ombudsperson was created by the legislature in 1977. For many years, the position was unfunded and unfilled. In recent years, the ODOC has revealed itself to be an agency in crisis. In 2022, the legislature increased the general fund appropriation to the Governor’s Office to fund the statutorily required Corrections Ombudsperson in the Office of the Governor. The position was subsequently filled in November 2022. It is unclear when the position was last filled and funded, but it has been at least two decades.

The Corrections Ombudsperson powers, established in ORS 423.400-450, are vast and significant; and can lead to meaningful oversight of the ODOC. ORS 423.420 establishes the general duties and powers of the Corrections Ombudsperson:

- Investigate, on complaint or on the ombudsperson’s own motion, any action by ODOC or any employee;
- **Subpoena the records and documents of the ODOC or any ODOC employee;**
- Enter and inspect, without notice, any premises under the jurisdiction of ODOC;
- Subpoena any person to appear, to give sworn testimony or to produce documentary or other evidence that is reasonably material to an inquiry; and
- File suit in the Circuit Court for Marion County to enforce ORS 423.400 to 423.450 (Contempt proceedings against person interfering with ombudsperson).

ORS 423.425 describes the Ombudsperson’s investigatory authority, stating that the Corrections Ombudsperson **shall** investigate, on complaint or on the Ombudsperson’s own motion, any corrections action that is or is alleged to be:

- Contrary to or inconsistent with law or Department of Corrections practice;
- Based on mistaken facts or irrelevant considerations;
- Inadequately explained when reasons should have been revealed;
- Inefficiently performed; **or**
- Unreasonable, unfair, or otherwise objectionable, even though in accordance with law.

Importantly, ORS 423.450 provides the Corrections Ombudsperson with the significant power to initiate contempt proceedings:

- “If any person willfully obstructs or hinders the proper and lawful exercise of the Corrections Ombudsperson’s powers, or willfully misleads or attempts to mislead the Corrections Ombudsperson in inquiries under ORS 423.400 (Office established) to 423.450 (Contempt proceedings against person interfering with ombudsperson), the judge of the Circuit Court for Marion County, on application of the ombudsperson, **shall** compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein.”

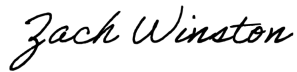
However, these statutory powers are only effective if the Ombudsperson is able to fully utilize them without interference or obstruction. Our understanding is that the Ombudsperson has been assigned an ODOJ attorney to provide legal advice. A conflict of interest clearly exists in ODOJ serving as counsel to the Corrections Ombudsperson in the exercise of these statutory powers, while also serving as counsel to the likely adverse party—ODOC. For example, ODOJ has an inherent interest in protecting ODOC by discouraging or advising the Corrections Ombudsperson against the use of their statutory powers. Moreover, should the Corrections Ombudsperson use their powers and file suit in Marion County Circuit Court, ODOJ would be representing both parties in the case—the Corrections Ombudsperson and ODOC. On appearance alone, the current arrangement calls into question the Ombudsperson’s independence and ability to provide effective oversight of ODOC. On a substantive point, this is a conflict of interest and perhaps subject to further investigation by the Oregon State Bar: the activities, actions, and advice by ODOJ to the current Corrections Ombudsperson. As a first step to address this conflict, it is imperative that the Corrections Ombudsperson be provided independent counsel, a non-ODOJ attorney.

Furthermore, we believe there is a potential conflict of interest with the Governor’s Office since the appointer of the position also oversees and appoints the head of ODOC. Due to the public scrutiny and opinion that the Governor’s Office is subjected to on the performance of state agencies under their control, like ODOC, it is in the best interest of the Governor’s Office to insulate and protect said state agencies. This could result in the Governor’s Office explicitly, or implicitly, discouraging the Corrections Ombudsperson from taking an adverse tone or position against ODOC. Consequently, this leaves the Corrections Ombudsperson in a position where they could be expected to uphold the status quo and limit scrutiny of ODOC, or risk being discharged from the position by the Governor, unilaterally.

We urge the Governor’s Office to review its position on the Corrections Ombudsperson and provide the position with the support and resources it needs to work effectively and operate independently. The Corrections Ombudsperson should be provided with an office that is fully staffed to handle investigatory duties (necessarily including staff that have demonstrated history

of investigating prisons or advocating for the rights of those incarcerated); should be assigned legal counsel that is independent of any state agencies or conflicts of interest; and, should exist and operate separately, in all possible ways, from the influence of the Governor's Office, ODOJ, and ODOC. Oregonians should live in a state where its systems and agencies are held to the highest standards—the Corrections Ombudsperson is a crucial component to guaranteeing that vision.

Sincerely,

A handwritten signature in cursive script that reads "Zach Winston".

Zach Winston
Oregon Justice Resource Center
Director of Policy and Outreach

A handwritten signature in cursive script that reads "Justin Low".

Justin Low
Oregon Justice Resource Center
Associate Director of Policy and Research

CC: Andrea Cooper, Chief of Staff
Constantin Severe, Public Safety Advisor
Richard Lane, General Counsel