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VIA CERTIFIED MAIL AND ELECTRONIC MAIL

Lisa M. Udland
Deputy Attorney General
Oregon Department of Justice
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Salem, OR 97301
Email: AttorneyGeneral@Doj.state.or.us

**Re: Petition for Public Records Disclosure Order
Building Codes Division, Oregon Department of Consumer and Business Services
Oregon State Fire Marshall
DOJ File Nos.: 440918-GA0188-23 and 260001-GA0190-23**

Dear Ms. Udland,

I write on behalf of my client, Public.Resource.Org (“PRO”) regarding your letter from December 22, 2023. As you know, PRO filed requests with the Building Codes Division of the Department of Consumer and Business Services (“BCD”) and the Oregon State Fire Marshall (“OSFM”) to disclose digital copies of the Oregon Electrical, Plumbing, Structural, Mechanical, and Residential Specialty Codes, and the Fire Code (collectively, the “Codes”). Your letter says that neither BCD or the Oregon Fire Marshall “publishes nor possesses” the integrated digital versions of the Codes. We find this to be unlikely, contrary to express contractual duties, and inconsistent with fundamental principles of Oregon law.

First, we are concerned that the statements represented in your letter are inconsistent with the contractual obligations between the state’s agencies and the standards organizations, which give the agencies possession and constructive possession of the codes.

BCD entered into a contract with the National Fire Protection Association (“NFPA”) in 2021 whereby NFPA would agree to “distribute and sell” the “Compiled Work,” which includes BCD’s amendments to the electrical code. The “State of Oregon – Terms and Conditions” is included as a part of that agreement. Section 11 of the Terms and Conditions provides that “Contractor shall grant the State and its agencies, the Secretary of State, the federal government, and their duly authorized representatives access to the Records, including reviewing, auditing, copying, and making transcripts.” So too for the contract between BCD

and the International Association of Plumbing and Mechanical Officials (“IAPMO”), executed in May 2023. So too for the contract between the International Code Council and BCD, executed in June 2014, and amended for assignment in April 2021 (See § N). Pursuant to these contractual provisions, BCD has the right to request copies of the Building Codes.

Second, these contracts provide that BCD has “final approval” power over the contents of the codes. Because of this final approval power, BCD must receive, review, and approve of the Building Codes from the third-party contractors before their publication. Contrary to your letter, such a dynamic necessarily implies that BCD has possession of the final integrated versions of the requested Codes.

Finally, the contracts give full authorship and editorial power over the Codes to BCD. BCD can amend, change, update or strike any text of the Codes. Accordingly, BCD has full dominion over the contents of the Codes, independent of physical possession. *See* ORS 161.015(9); *State v. Wisley*, 138 Or App 344, 348, 909 P.2d 877, 879 (1995) (explaining that “constructive possession” is established with the “knowing[] exercise[] [of] control or the right of control.”) (*quoting State v. Coria*, 39 Or App 507, 511, 592 P.2d 1057, *rev den* 286 Ore. 449 (1979)). Here, the contracts between BCD and private third parties unambiguously grant BCD the unilateral right to control the entire text of the Codes. There is no reasonable dispute that contractually, and legally, the State of Oregon – and not private third party publishers – has full control over the contents of Oregon law. Accordingly, BCD has constructive possession of the Codes and must produce them.

Contrary to your letter, these contracts and authorities establish that the agencies are indeed in possession of the entire integrated codes, which are accessible to the agencies, reviewed and approved by the agencies, and which are subject to the agencies’ complete control at all times. As a basic matter, it is inconceivable that the State of Oregon would deny that it possesses a copy of the complete and unified laws that govern private and public conduct within its borders.

We ask that you re-examine these authorities, in light of your conversations with BCD and the Oregon Fire Marshall, and provide an updated response at your earliest convenience. Please feel free to reach out to me directly at any time to discuss this issue. We look forward to your response.

cc: Client

Best regards,

LANE POWELL PC



Ryan O'Hollaren