

CHAPTER 407
DEPARTMENT OF HUMAN SERVICES, ADMINISTRATIVE SERVICES DIVISION
AND DIRECTOR'S OFFICE

DIVISION 14
PRIVACY AND CONFIDENTIALITY

Confidentiality And Mediation Communications

407-014-0200

Confidentiality and Inadmissibility of Mediation Communications

- (1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.
- (2) Nothing in this rule affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other rules of the agency, mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.
- (3) This rule applies only to mediations in which the agency is a party or is mediating a dispute as to which the agency has regulatory authority. This rule does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.
- (4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.
- (5) Mediations Excluded. Sections (6)-(10) of this rule do not apply to:
 - (a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or
 - (b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;
 - (c) Mediation in which the only parties are public bodies;
 - (d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public

bodies provide that mediation communications in the mediation are not confidential;

- (e) Mediation involving 15 or more parties if the agency has designated that another mediation confidentiality rule adopted by the agency may apply to that mediation.
- (6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:
- (a) All the parties to the mediation and the mediator agree in writing to the disclosure; or
 - (b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c)-(d), (j)-(l) or (o)-(p) of section (9) of this rule; or
 - (c) The mediation communication includes information related to the health or safety of any child, then the mediation communication may be disclosed and may be admitted into evidence in a subsequent proceeding to the extent the disclosure is necessary to prevent or mitigate a threat or danger to the health or safety of any child.
 - (d) The mediation communication includes information relating to suffering by or commission of abuse upon certain persons and that information would otherwise be required to be reported by a public or private official under the provisions of ORS 124.060 (person 65 years of age or older), ORS 430.765 (1) and (2) (person who is mentally ill or developmentally disabled who is 18 years of age or older and receives services from a community program or facility) or 441.640 (person who is a resident in a long-term care facility), in which case that portion of the mediation communication may be disclosed as required by statute.
- (7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in sections (8)-(9) of this rule, mediation communications are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.
- (8) Written Agreement. Section (7) of this rule does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an authorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the

following form. This form may be used separately or incorporated into an "agreement to mediate." [Form not included. See ED. NOTE.]

- (9) Exceptions to confidentiality and inadmissibility.
- (a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.
 - (b) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.
 - (c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.
 - (d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.
 - (e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.
 - (f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.
 - (g) An employee of the agency may disclose confidential mediation communications to another agency employee so long as the disclosure is necessary to conduct authorized activities of the agency. An employee receiving a confidential

mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

- (h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.
- (i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.
- (j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.
- (k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:
 - (A) A request for mediation, or
 - (B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of mediation; or
 - (C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or
 - (D) A strike notice submitted to the Employment Relations Board.
- (l) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.
- (m) Written mediation communications prepared by or for the agency or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the

communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

- (A) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege; or
 - (B) Attorney work product prepared in anticipation of litigation or for trial; or
 - (C) Prepared exclusively for the mediator or in a caucus session and not given to another party in the mediation other than a state agency; or
 - (D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or
 - (E) Settlement concepts or proposals, shared with the mediator or other parties.
- (n) A mediation communication made to the agency may be disclosed and may be admitted into evidence to the extent the Agency Director, Division Administrator or designee determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.
- (o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 30.402 or state or federal law requires the terms to be confidential.
- (p) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232 (4).
- (q) The mediation communication may be disclosed and may be admitted into evidence in a subsequent proceeding to the extent the disclosure is necessary to prevent or mitigate a threat or danger to the health or safety of any child or person 65 years of age or older, person who is mentally ill or developmentally disabled and receives services from a community program or facility as defined in ORS 430.735 or person who is a resident of a long-term care facility.

- (10) When a mediation is subject to section (7) of this rule, the agency will provide to all parties to the mediation and the mediator a copy of this rule or a citation to the rule and an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

[ED. NOTE: Copies of the Form referenced in this rule are available from the agency.]

Stat. Authority: ORS 409.050

Stats. Implemented: ORS 36.224, ORS 36.228, ORS 36.230, ORS 36.232 & ORS 36.234

407-014-0205

Confidentiality and Inadmissibility of Workplace Interpersonal Dispute Mediation Communications

- (1) This rule applies to workplace interpersonal disputes, which are disputes involving the interpersonal relationships between this agency's employees, officials or employees and officials. This rule does not apply to disputes involving the negotiation of labor contracts or matters about which a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed.
- (2) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.
- (3) Nothing in this rule affects any confidentiality created by other law.
- (4) To the extent mediation communications would otherwise be compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in ORS 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this rule.
- (5) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:
 - (a) All the parties to the mediation and the mediator agree in writing to the disclosure; or
 - (b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) or (h)-(j) of section (7) of this rule; or
 - (c) The mediation communication includes information related to the health or safety of any child, then the mediation communication may be disclosed and may be admitted into evidence in a subsequent proceeding to the extent the disclosure is

necessary to prevent or mitigate a threat or danger to the health or safety of any child.

- (d) The mediation communication includes information relating to suffering by or commission of abuse upon certain persons and that information would otherwise be required to be reported by a public or private official under the provisions of ORS 124.060 (person 65 years of age or older), ORS 430.765 (1) and (2) (person who is mentally ill or developmentally disabled who is 18 years of age or older and receives services from a community program or facility) or 441.640 (person who is a resident in a long-term care facility), in which case that portion of the mediation communication may be disclosed as required by statute.
- (6) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in section (7) of this rule, mediation communications in mediations involving workplace interpersonal disputes are confidential and may not be disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced into evidence by the parties or the mediator in any subsequent proceeding so long as:
- (a) The parties to the mediation and the agency have agreed in writing to the confidentiality of the mediation, and;
 - (b) The person agreeing to the confidentiality of the mediation on behalf of the agency:
 - (A) Is neither a party to the dispute nor the mediator, and
 - (B) Is designated by the agency to authorize confidentiality for the mediation, and
 - (C) Is at the same or higher level in the agency than any of the parties to the mediation or who is a person with responsibility for human resources or personnel matters in the agency, unless the agency head or member of the governing board is one of the persons involved in the interpersonal dispute, in which case the Governor or the Governor's designee.
- (7) Exceptions to confidentiality and inadmissibility.
- (a) Any statements, memoranda, work products, documents and other materials, otherwise subject to discovery that were not prepared specifically for use in the mediation are not confidential and may be disclosed or introduced into evidence in a subsequent proceeding.
 - (b) Any mediation communications that are public records, as defined in ORS 192.410 (4), and were not specifically prepared for use in the mediation are not

confidential and may be disclosed or introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential or privileged under state or federal law.

- (c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.
- (d) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.
- (e) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.
- (f) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.
- (g) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.
- (h) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.
- (i) To the extent a mediation communication contains information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to

192.505, that portion of the communication may be disclosed as required by statute.

- (j) The mediator may report the disposition of a mediation to the agency at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The agency or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232 (4).
 - (k) The mediation communication may be disclosed and may be admitted into evidence in a subsequent proceeding to the extent the disclosure is necessary to prevent or mitigate a threat or danger to the health or safety of any child or person 65 years of age or older, person who is mentally ill or developmentally disabled and receives services from a community program or facility as defined in ORS 430.735 or person who is a resident of a long-term care facility.
- (7) The terms of any agreement arising out of the mediation of a workplace interpersonal dispute are confidential so long as the parties and the agency so agree in writing. Any term of an agreement that requires an expenditure of public funds, other than expenditures of \$1,000 or less for employee training, employee counseling or purchases of equipment that remain the property of the agency, may not be made confidential.
- (8) When a mediation is subject to section (6) of this rule, the agency will provide to all parties to the mediation and to the mediator a copy of this rule or an explanation of where a copy may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Authority: ORS 409.050

Stats. Implemented: ORS 36.224, ORS 36.228, ORS 36.230, ORS 36.232 & ORS 36.234