



Proposed administrative rules governing facilitated dispute resolution, consistent with ORS 192.468.

PROCEDURAL RULES – Division 1

[180-001-0000] Notice of Proposed Rule

- (1) Prior to the adoption, amendment, or repeal of a permanent rule, the Office of the Public Records Advocate shall give notice of the proposed adoption, amendment, or repeal:
- a. In the Secretary of State’s Bulletin referred to in ORS 183.360 at least 21 days before the effective date of the rule;
 - b. By mailing or emailing a copy of the Notice to persons on the Office of the Public Records Advocate mailing list established pursuant to ORS 183.335(8) at least 28 days before the effective date of the rule;
 - c. By mailing or emailing a copy of the Notice to the legislators specified in ORS 183.335(15) at least 49 days before the effective date of the rule; and
 - d. By mailing, emailing, or furnishing a copy of the Notice to:
 - i. The Associated Press;
 - ii. The Capitol Press Room;
 - iii. At least three Oregon publications representing a geographically diverse segment of the state population;

[180-001-0001] Model Rules of Procedure

Pursuant to ORS 183.341, the Office of the Public Records Advocate adopts the Attorney General’s Model Rules of Procedure under the Administrative Procedure Act.

FACILITATED DISPUTE RESOLUTION – Division 2

[180-002-0000] Statutory Authority

These rules are adopted under the Office of the Public Records Advocate’s general rulemaking authority of ORS 192.468 to provide rules of practice and procedure necessary to implement ORS 192.464 and to carry out the public function of the Office. [Authority: ORS 192.468]

[180-002-0001] Effective Date; Applicability

These rules are effective _____ and shall apply to all requests for facilitated dispute resolution services active and pending before the Advocate or the Deputy, if the Advocate has delegated dispute resolution authority to the Deputy, under the provisions of ORS 192.461.

[180-002-0002] Definitions

Definitions under these rules are consistent with ORS 192.311 Definitions for ORS 192.311 to 192.478

- (1) “The Office” means the Office of the Public Records Advocate;
- (2) “Advocate” means the Public Records Advocate or the Deputy Public Records Advocate as their designee;



- (3) "Requester" means any individual or organization defined as a "person" under ORS 192.311(3) seeking public records from a public entity;
- (4) "Public body" includes every state officer, agency, department, division, bureau, board and commission; every county and city governing body, school district, special district, municipal corporation, and any officer, board, department, commission, council or agency thereof, and any other public agency of this state;
- (5) "Facilitated dispute resolution" mean the process for resolving disputes by which the Advocate, serving as an independent neutral third person, assists two or more eligible parties to a public records controversy in reaching a resolution.
- (6) "State agency" means:
 - a) Any state officer, department, board or commission created by the Constitution or statutes of this state;
 - b) Does not include:
 - A. The Legislative Assembly or its committees, officers and employees; or
 - B. The Judicial Department or its officers and employees.
- (7) "Eligible parties" are party to facilitated dispute resolution under ORS 192.464 and include the following:
 - a) A requester who seeks to inspect or receive copies of public records from a state agency if the person:
 - A. Has been denied access to all or a portion of the records being sought;
 - B. Has been denied a fee waiver or reduction in fees after asserting under ORS 192.324(5) that a fee waiver or reduction of fees is in the public interest; or
 - C. Received a written fee estimate under ORS 192.324 (Copies or inspection of public records) (4) that the person believes exceeds the actual cost to be incurred by the public body in producing the requested records.
 - b) A state agency if, in response to a request for public records, the agency asserts:
 - A. That the records being sought are not public records;
 - B. That the records being sought are exempt from mandatory disclosure; or
 - C. That the agency is, under ORS 192.324 (Copies or inspection of public records), entitled to the fees the agency is seeking to produce the records being requested.
 - c) A requester who seeks to inspect or obtain copies of public records from a city;
 - d) A "city" as used in this section, is consistent with the definition provided in ORS Chapter 221 (Organization and Government of Cities) and means a city incorporated under ORS 221.020 to 221.100 or proposed to be incorporated.

[180-002-0003] Facilitated Dispute Resolution Policy

- (1) It is the policy of the Office of the Public Records Advocate to provide timely and amicable facilitated dispute resolution services in compliance with the letter and spirit of Oregon's public records law, contained in ORS Chapter 192.



- (2) The dispute resolution process is framed by procedures provided under ORS 192.464, relevant state statutes and regulations, the Office's administrative rules and policies, and the Oregon Administrative Procedures Act.
- (3) Consistent with ORS 192.464 and 192.458, the Advocate possesses sole discretion over the process, procedure, and conduct of facilitated dispute resolution under this section.

[180-002-0004] Procedure Governing Facilitated Dispute Resolution

- (1) Parties requesting facilitated dispute resolution shall do so by submitting a written request to the Advocate. The request shall include the following information:
 - a. A request for facilitated dispute resolution;
 - b. Whether the party seeking facilitated dispute resolution falls within the definition of an eligible party as defined in this rule.
 - c. If the party seeking facilitated dispute resolution is a records requester:
 - A. (i) The public body that the requester is seeking to inspect or receive copies of public records from; and
(ii) If the public body from which the request is seeking to inspect or receive copies of public records from is a city, whether the city has agreed to have the Public Records Advocate facilitate resolution of the dispute;
 - B. The records that requester is seeking to inspect or receive copies of;
 - C. Whether the requester has submitted a public records request to the public body, including the date of submission;
 - D. Whether the requester has been denied access to all or a portion of the records being sought;
 - E. Whether the requester has been denied a fee waiver or reduction in fees after asserting under ORS 192.324(5) that a fee waiver or reduction of fees is in the public interest;
 - F. Whether requester has received a written fee estimate under ORS 192.324(4) that the person believes exceeds the actual cost to be incurred by the public body in producing the requested records; and
 - d. If the party seeking facilitated dispute resolution is a state agency:
 - A. Whether the state agency asserts that the records being sought are not public records;
 - B. Whether the state agency asserts that records being sought are exempt from mandatory disclosure; or
 - C. Whether the state agency asserts that the agency is entitled to the fees it is seeking to produce the records being requested, consistent with ORS 192.324.
 - e. If the party seeking facilitated dispute resolution is a city, whether the person seeking records agrees to have the Public Records Advocate facilitate resolution of the dispute.



- f. The Advocate reserves the discretion to request such other information as may be required to determine whether the dispute is appropriate for facilitated dispute resolution.
- (2) If the party seeking facilitated dispute resolution is a state agency:
 - a. A requester seeking to inspect or receive copies of public records may opt out of facilitated dispute resolution services by giving written notice of this decision within five (5) days of the requester's receipt of the agency's request for facilitated dispute resolution.
 - b. If written notice is given under this paragraph, the Advocate will not make a determination that the requester has failed to engage in good faith.
 - c. The state agency may not deny the request or refuse to disclose the requested records on the basis that the requester has failed to engage in good faith in the facilitated dispute resolution process.
 - (3) Once the Office receives a request for facilitated dispute resolution, the Advocate shall verify the eligibility of the parties to receive facilitated dispute resolution under this section and shall conduct and complete dispute resolution between the parties within 21 days following receipt by the Advocate of all necessary information to verify whether the parties are eligible parties.
 - a. If the Office receives incomplete information from a request for facilitated dispute resolution, the Advocate will inform the requester, as soon as is practicable, what additional information is needed. The 21-day period will not begin to run until the requester submits this additional information.
 - b. If the request for facilitated dispute resolution involves public records from a city, the Advocate will verify that:
 - A. The person seeking records consents to have the Advocate facilitate resolution of the dispute;
 - B. The city consents to have the Advocate facilitate resolution of the dispute; and
 - C. The Advocate consents to facilitated resolution of the dispute. The Advocate will exercise discretion in making this determination based on the nature of the request, the position of the parties, and the workload of the Office.
 - c. The facilitated dispute resolution period may be extended by unanimous agreement among the public records requester, the public body, and the Advocate.
 - A. If parties fail to reach unanimous agreement to extend the time to complete facilitated dispute resolution and no agreement is reached between the records requester and the state agency or city, the Advocate will prepare a written document memorializing the fact that that parties did not agree to extend the time to complete facilitated dispute resolution.



- (4) Once the Advocate determines that facilitated dispute resolution is appropriate under ORS 192.464, the Advocate maintains discretion to utilize the full continuum of dispute resolution processes including, but not limited to:
- a. Correspondence and discussion between the Advocate and the individual parties involving open and candid discussion, interpretation of applicable public records law, and other communications in furtherance of problem-solving.
 - A. While the Advocate may provide advisory guidance and advice on matters pertaining to public records request processing and the disclosure and applicability of exemptions from disclosure of public records, such guidance and advice ceases when such advice is sought by an eligible party to a matter for which the Advocate has begun providing facilitated dispute resolution services. [ORS 192.475(4)]
- (5) The Advocate shall provide facilitated dispute resolution services with the following guidelines for conduct:
- a. Practice active listening, empathy, and validation;
 - b. Be sensitive to and aware of cross-cultural issues;
 - c. Maintain neutrality;
 - d. Identify and reframe interests and issues;
 - e. Establish trust and respect; and
 - f. Use techniques to achieve agreement, including creating a climate conducive to resolution, identifying options, working toward agreement, and reaching consensus.

[180-002-0005] Standards of Conduct for Eligible Parties

- (1) Eligible parties to the facilitated dispute resolution process shall engage the Advocate and the other parties in good faith for the duration of the process. A party's good faith effort to participate in the dispute resolution process can be demonstrated by the following non-exhaustive conduct:
- a. Maintaining an open channel of communication with the Advocate and the Office;
 - b. Responding in a timely manner to requests for information from the Advocate;
 - c. Honestly and fairly deal with the Advocate and with other parties;
 - d. Complying with applicable public records law; and
 - e. Not seeking to unreasonably delay the dispute resolution process by refusing to cooperate or intentionally withholding information that is helpful to the resolution of the public records dispute.
- (2) The failure of an eligible party to comply with subsection (1) may result in termination of the facilitated dispute resolution process or, if the process has not yet begun, the Advocate's determination that the proceeding will not commence. Such a determination by the Advocate is final. Furthermore, the Advocate may choose to refuse to offer subsequent facilitated dispute resolution services to a party that has failed to comply with subsection (1) until the party has stated in writing its willingness to comply with this section.



[180-002-0006] Remedies Available Under Facilitated Dispute Resolution

- (1) A records requester that is party to the facilitated dispute resolution may request the Advocate to determine whether a state agency has engaged in good faith in the facilitated dispute resolution process, as described in Section 180-002-0004. A finding that a state agency has failed to engage in good faith in the dispute resolution process shall be grounds for the award to the records requester for all costs and attorney fees incurred in pursuing the request.
- (2) A state agency that is a party to the facilitated dispute resolution may request the Advocate to determine whether the records requester has engaged in good faith in the facilitated dispute resolution process, as described in Section 180-002-0004. A finding that a records requester has failed to engage in good faith in the dispute resolution process shall be grounds for the state agency to deny the request and refuse to disclose the requested records.
- (3) The failure of a state agency to engage in good faith in the facilitated dispute resolution process after a public records requester seeks facilitated dispute resolution services shall be grounds for the award of costs and attorney fees to the public records requester for all costs and attorney fees incurred in pursuing the request after a good faith determination by the Advocate.
- (4) Remedies under this section are not available to persons seeking to inspect or obtain copies of public records from a city.

[180-002-0007] Outcomes of facilitated dispute resolution

- (1) If the facilitated dispute resolution results in an agreement between the parties, the Advocate shall prepare a written document memorializing the agreement.
 - a. The written agreement shall be executed by the public records requester and an authorized representative of the state agency or city.
 - b. The written agreement shall control the resolution of the records request.
- (2) If the facilitated dispute resolution does not result in an agreement between the parties, the Advocate may draft a report summarizing the outcome of the dispute resolution process and make the report available to the parties.
 - a. The report will include the Advocate's determination and order concerning whether a party is acting in good faith, if such a finding has been made.
 - b. The report will include the Advocate's determination and order granting any remedies under ORS 192.464(4).

[180-002-0008] Notice of Agency Decision

A determination by the Advocate that a party failed to engage in good faith facilitated dispute resolution and application of the remedies available under ORS 192.464(4) shall be issued in writing to the parties, consistent with the procedure set forth in ORS 183.484

[180-002-0009] Reconsideration – Orders in Other than Contested Case



- (1) An eligible party entitled to judicial review under ORS 183.484 of a final order in other than a contested case may file a petition for reconsideration of the Advocate's findings within 21 calendar days after the date of the order. A copy of the petition shall also be delivered or mailed to all other eligible parties to the dispute resolution.
- (2) The petition shall set forth the specific grounds for reconsideration. The petition may be supported by a written argument.
- (3) The petition may be granted or denied by summary order.
- (4) Consistent with ORS 183.484(2), if the Advocate takes no action within 60 days after a petition for reconsideration is served to the agency, the petition shall be deemed denied.
- (5) Within 30 calendar days after the date of the order, the agency may, on its own initiative, reconsider the final order. If petition for judicial review has been filed, the agency must follow the procedures set forth in ORS 183.484(4) before taking further action on the order. The procedural and substantive effect of granting reconsideration under this subsection shall be identical to the effect of granting a party's petition for reconsideration.
- (6) Reconsideration shall not be granted after the filing of a petition for judicial review, unless permitted by the court.
- (7) A final order remains in effect during reconsideration until stayed or changed.
- (8) Following reconsideration, the agency shall enter a new order, which may be an order affirming the existing order.

[180-002-0010] Judicial review of Advocate's good faith findings

The Advocate's determination that a party has failed to engage in good faith facilitated dispute resolution and an award of costs and attorney fees are subject to review by the Circuit Court of Marion County as a proceeding under ORS 183.484 (Jurisdiction for review of orders other than contested cases).

[180-002-0011] Confidentiality of facilitated dispute resolution communications and agreements

- (1) Consistent with ORS 192.472, written records, documents, notes, or statements of any kind prepared for or submitted to the Public Records Advocate, prepared by the Advocate and Deputy, or exchange between parties seeking a facilitated dispute resolution are subject to ORS 36.220 to 36.238.
- (2) For the purposes of this rule:
 - a. "Facilitated dispute resolution agreement" means an agreement arising out of facilitated dispute resolution, including any term or condition of the agreement.
 - b. "Facilitated dispute resolution communications" means the same as "mediation communication" for the purposes of these rules and consist of:
 - i. All communications that are made, during or in connection with facilitated dispute resolution, to the Advocate, the Deputy, and eligible parties; and
 - ii. All memoranda, work product, documents, and other materials, including any draft facilitated dispute resolution agreement, that are prepared for or



submitted in the course of or in connection with facilitated dispute resolution or by the Advocate, Deputy, or eligible parties.

- (3) The Office of the Public Records Advocate adopts the Model Rule of Confidentiality and Inadmissibility of Mediation Communications in OAR 137-050-0052.
- (4) Consistent with ORS 36.226(2), if a city is an eligible party to facilitated dispute resolution, the city may adopt a policy that provides that all or part of facilitated dispute resolution communications will not be confidential. If a city adopts such a policy under this subsection, notice of the policy must be provided to all other eligible parties and to the Advocate. If no such policy exists, OAR 137-050-0052 shall apply.

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