

3-26

Secretary of State  
Certificate and Order for Filing  
**PERMANENT ADMINISTRATIVE RULES**

I certify that the attached copies\* are true, full and correct copies of the PERMANENT Rules(s) adopted on March 22, 2007 by the  
Date prior to or same as filing date.

Oregon Transportation Commission, Oregon Department of Transportation 731  
Agency and Division Administrative Rules Chapter Number

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to become effective upon filing Rulemaking Notice was published in the February 2007 Oregon Bulletin.\*\*  
Date upon filing or later Month and Year

**RULE CAPTION**

Adoption of Simplified Mediation Confidentiality rules  
Not more than 15 words that reasonably identify the subject matter of the agency's intended action.

**RULEMAKING ACTION**  
List each rule number separately, 000-000-0000.

**ADOPT:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.  
OAR 731-001-0720 & 731-001-0730

**AMEND:**

**REPEAL:**

OAR 731-001-0100, 731-001-0110, 731-001-0120, 731-001-0130, 731-001-0140, 731-001-0150, 731-001-0160, 731-001-0170, 731-001-0180, 731-001-0190, 731-001-0200, 731-001-0210, 731-001-0220, 731-001-0230, 731-001-0240, 731-001-0250, 731-001-0260, 731-001-0270, 731-001-0280, 731-001-0290, 731-001-0300, 731-001-0310, 731-001-0320, 731-001-0330, 731-001-0340, 731-001-0350, 731-001-0360, 731-001-0370, 731-001-0380, 731-001-0390, 731-001-0400, 731-001-0410, 731-001-0420, 731-001-0430, 731-001-0440, 731-001-0450, 731-001-0460, 731-001-0470, 731-001-0480, 731-001-0490, 731-001-0500, 731-001-0510, 731-001-0520, 731-001-0530, 731-001-0540, 731-001-0550, 731-001-0560, 731-001-0570, 731-001-0580, 731-001-0590, 731-001-0600, 731-001-0610, 731-001-0620, 731-001-0630, 731-001-0640, 731-001-0650, 731-001-0660, 731-001-0670, 731-001-0680, 731-001-0690, 731-001-0700, 731-001-0710

**RENUMBER:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

**AMEND & RENUMBER:** Secure approval of rule numbers with the Administrative Rules Unit prior to filing.

ORS 36.224, 184.616 & 184.619  
Stats. Auth. Other Authority

ORS 36.224, 36.228, 36.230 & 36.232  
Stats. Implemented

**RULE SUMMARY**

ORS 36.220 through 36.238 authorize state agencies to make mediation communications confidential. This Act also limits the discovery and admissibility of mediation communications in subsequent proceedings. The Department of Transportation currently has lengthy rules relating to mediation confidentiality. Since ODOT adopted these rules, the Department of Justice has developed simplified language for mediation confidentiality rules. ODOT has now adopted this simplified language. One rule covers mediation confidentiality for all areas of ODOT business except employee disputes. One rule applies specifically to mediation confidentiality for employee disputes.

Mike Marsh Mike Marsh 3/26/07  
Authorized Signer Printed Name Date

\* With this original, file one photocopy of certificate, one paper copy of rules listed in Rulemaking Actions, and electronic copy of rules.  
\*\* The Oregon Bulletin is published on the 1st of each month and updates the rule text found in the Oregon Administrative Rules Compilation. Notice forms must be submitted to the Administrative Rules Unit, Oregon State Archives, 800 Summer Street NE, Salem, Oregon 97310 by 5:00 pm on the 15th day of the preceding month unless this deadline falls on a Saturday, Sunday or legal holiday when Notice forms are accepted until 5:00 pm on the preceding workday. ARC 930-2005

DOT 3-2007

## **Confidentiality of Dispute Resolution by Mediation**

**731-001-0720**

### **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;
  - (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; or
  - (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.
- (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.

(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

an explanation of where a copy of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Authority: ORS 36.224, 184.616 & 184.619

Stat. Implemented: ORS 36.224, 36.228, 36.230 & 36.232

### **731-001-0730**

#### **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.

(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.

(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).

(8) 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.

(9) 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 of the rule may be obtained. Violation of this provision does not waive confidentiality or inadmissibility.

Stat. Authority: ORS 36.224, 184.616 & 184.619

Stat. Implemented: ORS 36.230(4)