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DIVISION 1

PROCEDURAL RULES

731-001-0000

Notice of Proposed Rules

In accordance with ORS 183.341, to provide a reasonable opportunity for interested persons to be notified of proposed actions, prior to the adoption, amendment or repeal of any rule, the Oregon Department of Transportation shall give notice of the proposed adoption, amendment or repeal:

- (1) In the Secretary of State's Bulletin referred to in ORS 183.360 and in accordance with ORS 183.335.
(2) By mailing a copy of the notice to persons on the Oregon Department of Transportation mailing lists for specific interest areas established pursuant to ORS 183.335(7).
(3) By mailing a copy of the notice to legislators as provided in ORS 183.335(14).
(4) By mailing a copy of the notice to the following:
(a) Associated Press;
(b) Northwest Labor Press;
(c) Associated Oregon Industries;
(d) Capitol Press Room; and
(e) Statesman-Journal newspaper.
Stat. Auth.: ORS 183.341 & ORS 184.616
Stats. Implemented: ORS 183.335 & ORS 183.341
Hist.: 1 OTC 67, f. & ef. 1-9-76; DOT 2-1990, f. & cert. ef. 2-26-90; DOT 1-1994, f. & cert. ef. 3-17-94; DOT 1-1996, f. & cert. ef. 8-8-96; DOT 1-1998, f. & cert. ef. 1-28-98

731-001-0005

Model Rules of Procedure

(1) The Attorney General's Model Rules of Procedure under the Administrative Procedures Act as amended September 4, 1997, and effective September 15, 1997, are hereby adopted by reference as the general administrative procedural rules of the Oregon Transportation Commission and the Oregon Department of Transportation.

(2) This rule shall supersede and replace the previously adopted 1995 edition of the Attorney General's Model Rules. Previously adopted special procedural rules of the affected agencies shall remain in effect to the extent they are not inconsistent with the Administrative Procedures Act and other statutory authority and policy.

[ED. NOTE: The full text of the Attorney General's Model Rules of Procedure is available from the Attorney General or Department of Transportation.]
 Stat. Auth.: ORS 183.341, ORS 184.616 & ORS 184.619
 Stats. Implemented: ORS 183.341
 Hist.: HC 1207, f. & ef. 10-9-69; HC 1245, f. & ef. 2-12-71; HC 1276, f. & 3-3-72, ef. 3-15-72; 1 OTC 1(Temp), f. & ef. 7-18-73; 1 OTC 2, f. & ef. 9-26-73; 1 OTC 3, f. 10-15-73, ef. 11-25-73; 1 OTC 68, f. & ef. 1-23-76; 1 OTC 3-1978, f. & ef. 3-29-78; 1 OTC 3-1980(Temp), f. & ef. 1-16-80; 1 OTC 7-1980, f. & ef. 3-28-80; 1 OTC 4-1981, f. & ef. 11-24-81; 1 OTC 1-1984, f. & ef. 1-6-84; 1 OTC 3-1986, f. & ef. 4-28-86; DOT 1-1988, f. & ef. 8-22-88; DOT 4-1990, f. & cert. ef. 8-14-90; DOT 1-1992, f. & cert. ef. 5-12-92; DOT 2-1994, f. & cert. ef. 3-17-94; DOT 2-1995, f. 11-21-95, cert. ef. 1-1-96; DOT 2-1997, f. & cert. ef. 12-23-97

Contested Case Hearings

731-001-0010

Evidence

(1) Only testimony of persons who have taken an oath or affirmation before the Examiner, or Commission or Engineer, as the case may be, shall be admitted.

(2) Every party has the right to present his case or defense by oral, documentary or other satisfactory evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and complete disclosure of the facts.

(3) The petitioner shall bear the burden of proof.

(4) Admission and exclusion of evidence:

(a) The rules of evidence and requirements of proof shall conform, to the extent practicable, with those in civil nonjury cases in the circuit courts, except as otherwise provided by ORS Chapter 183;

(b) Hearsay evidence in the discretion of the hearings officer or body, may be received if the hearings officer or body determines that the evidence is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs;

(c) Irrelevant, immaterial and merely cumulative evidence may be excluded and must be excluded upon objection;

(d) Expert and opinion evidence may be limited in the discretion of the Examiner or Commission or Engineer conducting the hearing;

(e) The hearings officer or body may rule upon the admission or exclusion of evidence at the hearing or may defer any such ruling until incorporated in the order;

(f) Unless specifically excluded by the hearings officer or body, exhibits and items of tangible evidence offered at the hearing shall be deemed admitted into evidence.

(5) Objections. If a party objects to the admission or rejection of any evidence or to the limitations of the scope of any examination or cross-examination, he shall state briefly the grounds of such objection, whereupon the party adversely affected by the ruling on the objection shall be granted an automatic exception.

(6) Judicial notice. The Examiner, Commission or Engineer, after first advising all parties of its intention to do so, may take notice of judicially cognizable facts as is provided by law ORS 183.450 and of general, technical or scientific facts within the specialized knowledge of the official(s) conducting the hearing.

Stat. Auth.: ORS 183 & ORS 184
 Stats. Implemented: ORS 183.341
 Hist.: 1 OTC 21-1980(Temp), f. & ef. 12-1-80; 1 OTC 1-1981, f. & ef. 4-1-81; DOT 3-1990, f. & cert. ef. 3-9-90

731-001-0015

Close of Hearing and Final Briefs

(1) Within 15 business days following the close of the hearing or the filing of final briefs, if any, the hearings officer or body shall either prepare a proposed order, direct the parties to submit proposed orders, or direct the prevailing party, as determined by the hearings officer or body, to submit a proposed order. Should the hearings officer or body direct the preparation of a proposed order(s) it shall do so by letter, with copies to all parties appearing at the hearing. The letter shall also set a date within which the order(s) must be submitted.

(2) Upon the preparation or submission of a proposed order, the hearings officer or body may accept an order or modify an order to comply with its findings and conclusions. The hearings officer or body shall thereupon serve the proposed order upon all

parties appearing at the hearing. If the officer or body is not the entity charged with administering the statutes involved in the hearing, and has not been delegated authority to issue a final order, it shall forward the case file, transcripts and exhibits, together with its proposed order, to the officer or entity charged with administering the relevant statutes.

(3) Upon mailing the proposed order to the parties, the parties shall have 20 days in which to file exceptions to the proposed order. If the proposed order has been forwarded to the officer charged with administering the relevant statutes, the parties may also request oral argument before that officer or body.

(4) Within 30 days of either the service of the proposed order, the filing of exceptions, or oral argument, as the case may be, the hearings officer or body, or the officer or entity charged with administering the relevant statutes, shall issue and mail a final order to all parties. The officer, body or entity may adopt, reverse or modify the proposed order in issuing a final order.

Stat. Auth.: ORS 183 & ORS 184
 Stats. Implemented: ORS 183.341
 Hist.: 1 OTC 21-1980(Temp), f. & ef. 12-1-80; 1 OTC 1-1981, f. & ef. 4-1-81

731-001-0025

Public Records Access and Fees

All information in the custody of the Director of the Oregon Department of Transportation shall be disclosed or protected from disclosure in accordance with Chapter 192 of the Oregon Revised Statutes.

(1) Requests for records may be verbal, however, the Department of Transportation may require the request to:

- (a) Be in writing;
- (b) Be dated;
- (c) Be signed;
- (d) Adequately describe the records being requested; and
- (e) Indicate the date the records are needed.

(2) A reasonable period of time, as determined by the department, shall be allowed for the records custodian to locate and assemble the requested records.

(3) Unless otherwise provided by statute or other administrative rule, the fees shall be calculated as follows:

- (a) \$0.20 per page for photocopies;
- (b) Actual cost for use of material and equipment for producing copies of non-standard records. "Non-standard" records include, but are not limited to:
 - (A) Audio tapes;
 - (B) Video tapes;
 - (C) Microfilm; and
 - (D) Machine readable formats such as computer hard drives, diskettes and magnetic tape.

(c) Costs for labor which includes locating, compiling, editing or otherwise processing information and records. There shall be no charge for the first 30 minutes of staff time. The labor rate assessed thereafter shall be \$15 per hour;

(d) The actual cost for delivery of records such as postage, FAX costs and courier fees; and

(e) \$5 for each true copy certification.

(4) Provisions in this rule do not apply to records available through the Driver and Motor Vehicle Services Branch of the Department of Transportation listed in Oregon Administrative Rule Chapter 735.

Stat. Auth.: ORS 184.616, ORS 192.430 & ORS 192.440
 Stats. Implemented: ORS 192.410 - ORS 192.505
 Hist.: DOT 1-1995, f. & cert. ef. 1-6-95

Confidentiality of Dispute Resolution by Mediation Highway Construction Claims

731-001-0100

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential

unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0110

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0110 to 731-001-0160 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute arises out of the administration of contracts which incorporate the Standard Specifications for Highway Construction adopted by the Department and is at Step 1 or Step 2 in the Claim Review Procedure under the Standard Specifications; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute, unless that dispute involves a highway construction contract dispute that has not advanced beyond Step 2 in the Standard Specifications for Highway Construction;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0110 to 731-001-0160 do 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.

(3) Nothing in OAR 731-001-0110 to 731-001-0160 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0110 to 731-001-0160 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an "agreement to mediate." If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the "agreement to participate in a confidential mediation." [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0100 to 731-001-0160 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0100 and 731-001-0110 to 731-001-0160;

(B) A summary of OAR 731-001-0100 and 731-001-0110 to 731-001-0160; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0120

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0110(1) are confidential and may not be disclosed so long as the communication was between the mediator and a party to the mediation and was not made in the presence of any other party to the mediation.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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 section is bound by the same confidentiality requirements as apply to the parties to the mediation.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0130 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0110 to 731-001-0160 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0130
 Certain Mediation Communications Not Confidential**

For the purposes of OAR 731-001-0120, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its

attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0140
 Applicability of Mediator Disclosure Rules**

(1) OAR 731-001-0140, 731-001-0150 and 731-001-0160 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law, ORS Chapter 240;

(D) A pre-litigation contract dispute, unless that dispute involves a highway construction contract dispute that has not advanced beyond Step 2 in the Standard Specifications for Highway Construction;

(E) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0140 to 731-001-0160 do 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.

(3) Nothing in OAR 731-001-0140 to 731-001-0160 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0140 to 731-001-0160 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0150
 Mediator May Not Disclose Mediation Communications**

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0140 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0160
 Notice of Disclosure of Mediation Communications**

(1) When a mediation is of a type described in OAR 731-001-0140(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0140(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0100 and 731-001-0140 to 731-001-0160;

(B) A summary of OAR 731-001-0100 and 731-001-0140 to 731-001-0160; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
 Mediation Environmental Remediation**

**731-001-0170
 Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)**

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0180
 Applicability of Mediation Confidentiality Rules**

(1) OAR 731-001-0170 to 731-001-0250 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute arises in connection with cost recovery or remediation of Hazardous Material or Waste; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(D) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0170 to 731-001-0250 do 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.

(3) Nothing in OAR 731-001-0170 to 731-001-0250 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0170 to 731-001-0250 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an "agreement to mediate." If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the "agreement to participate in a confidential mediation." [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may

be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0170 to 731-001-0250 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0170 and 731-001-0180 to 731-001-0250;

(B) A summary of OAR 731-001-0170 and OAR 731-001-0180 to 731-001-0250; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0190

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0180(1) are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0200 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0170 to 731-001-0250 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0200

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0190, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0210

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0180(1) are not admissible in any subsequent 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. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the

mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0220 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0180 to 731-001-0250 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0220

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0210, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0230

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0230 to 731-001-0250 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(D) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(E) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0230 to 731-001-0250 do 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.

(3) Nothing in OAR 731-001-0230 to 731-001-0250 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0230 to 731-001-0250 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0240

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0230(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled

by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0250

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0230(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0230 are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0170 and 731-001-0230 to 731-001-0250;

(B) A summary of OAR 731-001-0170 and 731-001-0230 to 731-001-0250; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution
 by Mediation Right Of Way**

731-001-0260

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under

state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0270

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0260 to 731-001-0330 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The dispute concerns the acquisition of real property by the Right of Way section of the Department of Transportation; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A pre-litigation contract dispute;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0270 to 731-001-0330 do not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined ORS 36.234.

(3) Nothing in OAR 731-001-0270 to 731-001-0330 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0270 to 731-001-0330 have the same meaning as given to them in ORS 36.110 through 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an "agreement to mediate." If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the "agreement to participate in a confidential mediation." [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0270 to 731-001-0330 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of 731-001-0260 and OAR 731-001-0270 to 731-001-0330;

(B) A summary of 731-001-0260 and OAR 731-001-0270 to 731-001-0330; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0280

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0270(1) are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0290 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0260 to 731-001-0330 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0290

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0280, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the com-

munication is not otherwise confidential or privileged under state or federal law.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0300

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0270(1) are not admissible in any subsequent 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. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some

or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0310 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0270 to 731-001-0340 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0310
 Certain Mediation Communications Discoverable and Admissible**

For the purposes of OAR 731-001-0300, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0320
 Applicability of Mediator Disclosure Rules**

(1) OAR 731-001-0320, 731-001-0330, and 731-001-0340 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority; and

(b) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A claim, subject to OAR 731-001-0630 to 731-001-710, against the agency under the State Personnel Relations Law;

(D) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(E) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(F) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0320 to 731-001-0340 do 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.

(3) Nothing in OAR 731-001-0320 to 731-001-0340 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0320 to 731-001-0340 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0330
 Mediator May Not Disclose Mediation Communications**

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0310 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and

may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0340

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0320(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0320(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0260 and OAR 731-001-0320 to 731-001-0340;

(B) A summary of OAR 731-001-0260 and OAR 731-001-0320 to 731-001-0340; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution
 by Mediation Prolitigation**

731-001-0350

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0360

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0350 to 731-001-0430 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0350 to 731-001-0430 do 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.

(3) Nothing in OAR 731-001-0360 to 0430 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0360 to 731-001-0430 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0360 to 731-001-0430 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0350 and 731-001-0360 to 731-001-0430;

(B) A summary of OAR 731-001-0350 and 731-001-0360 to 731-001-0430; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]
 Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0370

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0360 are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0380 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0360 to 731-001-0430 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0380

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0370, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0390

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0360(1) are not admissible in any subsequent 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. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the par-

ties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0400 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0360 to 731-001-0430 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0400

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0390, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0410

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0410, 731-001-0420 and 731-001-0430 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000; and

(c) The mediation does not involve:

(A) Proceedings conducted by the Employment Relations Board under ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000, or in response to a joint request from management and labor for mediation;

(B) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(D) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(E) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0360(1).

(2) OAR 731-001-0410 to 731-001-0430 do 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.

(3) Nothing in OAR 731-001-0410 to 731-001-0430 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0410 to 731-001-0430 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0420

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0410(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0430

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0410(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0410(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0350 and 731-001-0410 to 731-001-0430;

(B) A summary of OAR 731-001-0350 and 731-001-0410 to 731-001-0430; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

Confidentiality of Dispute Resolution by Mediation Collective Bargaining

731-001-0440

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0450

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0450 to 731-001-0530 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0450 to 731-001-0530 do 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.

(3) Nothing in OAR 731-001-0450 to 731-001-0530 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0450 to 731-001-0530 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0450 to 731-001-0530 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0440 and OAR 731-001-0450 to 731-001-0530;

(B) A summary of OAR 731-001-0440 and OAR 731-001-0450 to 731-001-0530; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0460

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0450(1) are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0470 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0450 to 731-001-0530 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0470

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0460, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0480

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0450(1) are not admissible in any subsequent 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. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not

prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0480 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0450 to 731-001-0530 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0490

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0480, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0500

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0500 to 731-001-0530 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; and

(c) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) A claim, subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0500 to 731-001-0530 do 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.

(3) Nothing in OAR 731-001-0500 to 731-001-0530 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0500 to 731-001-0530 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0510

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0500 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) A mediator may disclose mediation communications described in OAR 731-001-0520 and such communications may be introduced into evidence in any subsequent proceeding to the extent provided in that rule.

(9) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0520

Mediator May Disclose Certain Mediation Communications

For the purposes of OAR 731-001-0510, a mediator may disclose the following mediation communications and such communications may be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding when the mediation is conducted by the Employment Relations Board under OAR 115-040-0000, ORS 243.712, OAR 115-075-0000, or ORS 662.425 or the mediation is in response to a joint request to the

Employment Relations Board from labor and management for mediation services or the mediation is conducted as part of the negotiation of a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement:

- (1) A request for mediation;
- (2) A communication from the Employment Relations Board Conciliation Service establishing the time and place for mediation;
- (3) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or
- (4) A strike notice submitted to the Employment Relations Board.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0530

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0500(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0500(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0440 and 731-001-0500 to 731-001-0530;

(B) A summary of OAR 731-001-0440 and 731-001-0500 to 731-001-0530; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

Confidentiality of Dispute Resolution by Mediation Tort Claims

731-001-0540

Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Law 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0550

Applicability of Mediation Confidentiality Rules

(1) OAR 731-001-0550 to 731-001-0620 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a claim against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; and

(d) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0550.

(2) OAR 731-001-0550 to 731-001-0620 do 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.

(3) Nothing in OAR 731-001-0550 to 731-001-0620 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0550 to 731-001-0620 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0550 to 731-001-0620 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0540 and 731-001-0550 to 731-001-0620;

(B) A summary of OAR 731-001-0540 and 731-001-0550 to 731-001-0620; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0560

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0550 are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0570 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0550 to 731-001-0620 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0570

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0560, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0580

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0550(1) are not admissible in any subsequent 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. For the purposes of this rule, the term “subsequent proceeding” means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the par-

ties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0590 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0550 to 731-001-0620 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0590

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0580, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0600

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0600, 731-001-0610, and 731-001-0620 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a claim against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300; and

(c) The mediation does not involve:

(A) A claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law;

(B) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(C) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation.

(2) OAR 731-001-0600 to 731-001-0620 do 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.

(3) Nothing in OAR 731-001-0600 to 731-001-0620 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0600 to 731-001-0620 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0610
Mediator May Not Disclose Mediation Communications**

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0600 and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0620
Notice of Disclosure of Mediation Communications**

(1) When a mediation is of a type described in OAR 731-001-0600(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

- (A) Whether the agency is a party; and
- (B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0600(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0540 and 731-001-0600 to 731-001-0620;

(B) A summary of OAR 731-001-0540 and 731-001-0600 to 731-001-0620; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**Confidentiality of Dispute Resolution by
Mediation Employee Disputes**

**731-001-0630
Exemption from Disclosure under ORS 192.410 to 192.505 and Inadmissibility of Mediation Communications Pursuant to ORS 40.190 (OEC Rule 408)**

(1) Except to the extent that rules of this agency adopted pursuant to Oregon Laws 1997, chapter 670 make mediation communications confidential, any mediation communications that are public records, as defined in ORS 192.410(4), are not confidential unless the substance of such communication is confidential under state or federal law. Mediation communications are exempt from disclosure under the Public Records Law to the extent provided in ORS 192.410 to 192.505.

(2) Nothing in this rule affects any confidentiality created by other law.

(3) 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).

(4) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

**731-001-0640
Applicability of Mediation Confidentiality Rules**

(1) OAR 731-001-0640 to 731-001-0710 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The parties to the mediation agree in writing, as described in section (5) of this rule, that the mediation will be confidential;

(c) The mediation involves a claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law; and

(d) The mediation does not involve:

(A) Pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425, or OAR 115-075-0000;

(B) A claim, subject to OAR 731-001-0540 to 731-001-0620, against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) A collective bargaining negotiation or a dispute over terms of a collective bargaining agreement or a grievance under a collective bargaining agreement, when the agency is represented by the Department of Administrative Services in such a proceeding; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0640(1).

(2) OAR 731-001-0640 to 731-001-0710 do not apply when the agency is acting as the “mediator” in a matter in which the agency also is a party as defined ORS 36.234.

(3) Nothing in OAR 731-001-0640 to 731-001-0710 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0640 to 731-001-0710 have the same meaning as given to them in ORS 36.110 and 36.234.

(5) An agreement to participate in a confidential mediation must be in substantially the following form and be signed by the parties to the mediation. This form may be used separately or incorporated into an “agreement to mediate.” If the mediator is the employee of and acting on behalf of a state agency then he or she must also sign the “agreement to participate in a confidential mediation.” [Form not included. See ED. NOTE.]

(6) When a mediation is of a type described in this rule, the agency must provide notice to all parties to the mediation and the mediator of the extent to which mediation communications may be confidential and the mediation communications may be disclosed and introduced as evidence in subsequent proceedings. The notice required by this rule must be in writing and must include:

(a) An explanation of the agency’s role in the mediation, including:

(A) Whether the agency is a party as defined in ORS 36.234; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediations communications are confidential to the extent provided in OAR 731-001-0640 to 731-001-0710 so long as the parties and the agency have executed an agreement pursuant to section (5) of this rule;

(B) Mediation communications in mediations not described in section (1) of this rule are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224 or by other state or federal law; and

(C) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0630 and OAR 731-001-0640 to 731-001-0710;

(B) A summary of OAR 731-001-0630 and OAR 731-001-0640 to 731-001-0710; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(d) Any notice required by section (6) of this rule is not confidential and may be disclosed.

[ED. NOTE: The form referenced in this rule is not printed in the OAR Compilation. Copies are available from the agency.]
Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
Stats. Implemented: ORS 36.220 & ORS 36.245
Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

Confidential Mediation Communications, Exceptions

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0640(1) are confidential and may not be disclosed.

(1) 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.

(2) 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 unless the substance of the communication is made confidential by state or federal law.

(3) Any mediation communication relating to child abuse that is made to or in the presence of a person who is required to report child abuse under ORS 419B.010 is not confidential to the extent that the person is required to report the communication under ORS 419B.010.

(4) Any mediation communication relating to elder abuse that is made to or in the presence of a person who is required to report elder abuse under ORS 124.050 to 124.095 is not confidential to the extent that the person is required to report the communication under ORS 124.050 to 124.095.

(5) A mediation communication is not confidential if the mediator or a party to the mediation reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(6) 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 to the extent necessary to make such a report.

(7) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential.

(8) 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.

(9) 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.

(10) 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.

(11) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications 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.

(12) 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 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.

(13) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential.

(14) A written mediation communication may be disclosed by the party who prepared the communication so long as it does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(15) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505.

(16) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(17) Mediation communications described in OAR 731-001-0660 are not confidential to the extent provided in that rule.

(18) The terms of any mediation agreement are not confidential.

(19) Nothing in OAR 731-001-0640 to 731-001-0710 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0660

Certain Mediation Communications Not Confidential

For the purposes of OAR 731-001-0650, the following mediation communications are not confidential:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0670

Limitations on the Admissibility and Disclosure of Mediation Communications in Subsequent Proceedings

Except as provided in this rule, mediation communications in mediations described in OAR 731-001-0640(1) are not admissible in any subsequent 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. For the purposes of this rule, the term "subsequent proceeding" means any administrative, judicial or arbitration proceeding.

(1) Any statements, memoranda, work products, documents and other materials otherwise subject to discovery that were not

prepared specifically for use in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(2) Any mediation communications that are public records, as defined in ORS 192.410(4), and were not specifically prepared for use in the mediation may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential under state or federal law.

(3) A mediation communication 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.

(4) 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 may be disclosed to the extent necessary to make such a report.

(5) 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.

(6) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications 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.

(7) A written mediation communication may be disclosed and may be introduced as evidence in a subsequent proceeding by the party who prepared the communication so long as it does not contain information from another party to the mediation or the mediator, or information that is otherwise confidential under state or federal law.

(8) When the only parties to the mediation are public bodies, mediation communications and mediation agreements in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(9) When the parties to the mediation include a private party and two or more public bodies, mediation communications may be disclosed and may be introduced as evidence in a subsequent proceeding if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential.

(10) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation may be disclosed and may be introduced as evidence in a subsequent proceeding.

(11) A party may disclose mediation communications or mediation agreements in a subsequent proceeding if all the parties to the mediation agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in a subsequent proceeding.

(12) A mediator may disclose mediation communications or mediation agreements in any subsequent proceeding if all the parties to the mediation and the mediator agree in writing to the disclosure. A communication that has been disclosed may be introduced into evidence in subsequent proceedings.

(13) Mediation communications described in OAR 731-001-0680 are not confidential.

(14) The terms of any mediation agreement may be disclosed and may be introduced as evidence in a subsequent proceeding.

(15) Nothing in OAR 731-001-0640 to 731-001-0710 relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619
 Stats. Implemented: ORS 36.220 & ORS 36.245
 Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0680

Certain Mediation Communications Discoverable and Admissible

For the purposes of OAR 731-001-0670, the following mediation communications may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding:

(1) Any written communications prepared by or for the agency or its attorney, 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;

(b) Attorney work product prepared in anticipation of litigation or for trial;

(c) Prepared exclusively for the mediator and not given to another party in the mediation other than a state agency;

(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.

(2) A mediation communication described in subsections (1)(a) through (1)(e) of this rule to the extent that the agency or its attorney voluntarily chooses to disclose such communications and the communication does not contain information from another party or the mediator or information that is otherwise confidential under state or federal law.

(3) Any mediation communication made to the agency to the extent the agency-director/board/administrator 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.

(4) Any mediation communications containing information the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, to the extent disclosure is required by law.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0690

Applicability of Mediator Disclosure Rules

(1) OAR 731-001-0690, 731-001-0700, and 731-001-0710 apply only to mediations in which:

(a) The agency is a party or is mediating a dispute as to which the agency has regulatory authority;

(b) The mediation involves a claim, subject to OAR 731-001-0630 to 731-001-0710, against the agency under the State Personnel Relations Law; and

(c) The mediation does not involve:

(A) A pre-litigation contract dispute, other than a dispute in litigation subject to ORS 243.712, OAR 115-040-0000, ORS 662.425 or OAR 115-075-0000;

(B) A claim subject to OAR 731-001-0540 to 731-001-0620 against the agency that is eligible for coverage by the Risk Management Division under the Oregon Tort Claims Act, ORS 30.260 to 30.300;

(C) Negotiations for a collective bargaining agreement or a dispute arising under or governed by a collective bargaining agreement; or

(D) Litigation in which the agency is a plaintiff or a named defendant and has agreed in writing to participate in a mediation under OAR 731-001-0640(1).

(2) OAR 731-001-0680 to 731-001-0710 do 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.

(3) Nothing in OAR 731-001-0680 to 731-001-0710 affects any confidentiality created by other law.

(4) The words and phrases used in OAR 731-001-0680 to 731-001-0710 have the same meaning as given to them in ORS 36.110 and 36.234.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0700

Mediator May Not Disclose Mediation Communications

Except as provided in this rule, a mediator may not disclose or be compelled to disclose mediation communications in mediations described in OAR 731-001-0640(1) and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless all the parties to the mediation and the mediator agree in writing to the disclosure.

(1) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, a mediator may disclose mediation communications to the extent that those communications may be 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.

(2) A mediator may disclose confidential mediation communications directly related to child abuse or elder abuse if the mediator is a person who has a duty to report child abuse under ORS 419B.010 or elder abuse under ORS 124.050 to 124.095.

(3) A mediator may disclose confidential mediation communications if the mediator reasonably believes that disclosing the communication is necessary to prevent a party from committing a crime that is likely to result in death or bodily injury to any person.

(4) A mediator may disclose a mediation communication if, as a condition of a professional license, the mediator is compelled by law or the rule of a court to disclose a communication related to the conduct of another licensed professional.

(5) When the only parties to the mediation are public bodies, mediation communications and mediation agreements are not confidential except to the extent those communications or agreements are exempt from disclosure under ORS 192.410 to 192.505 and may be disclosed and introduced as evidence in any subsequent proceeding.

(6) When the parties to the mediation include a private party and two or more public bodies, mediation communications are not confidential if the laws, rules or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(7) When a person acts as the mediator in the mediation and also acts as the hearing officer in a contested case involving some or all of the same matters, the communications in the mediation are not confidential and may be disclosed and introduced into evidence in any subsequent proceeding.

(8) The terms of any mediation agreement are not confidential, may be disclosed and may be introduced as evidence in any subsequent proceeding.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

731-001-0710

Notice of Disclosure of Mediation Communications

(1) When a mediation is of a type described in OAR 731-001-0680(1), the agency must provide written notice to all parties to the mediation and the mediator informing them of the extent to which mediation communications may be confidential.

(2) The notice required by this rule must be in writing and must include:

(a) An explanation of the agency's role in the mediation, including:

(A) Whether the agency is a party; and

(B) Whether the mediator is an employee, contractor or agent of the agency.

(b) A statement that:

(A) Mediation communications in mediations not described in OAR 731-001-0680(1) are not confidential and may be disclosed unless provided otherwise by rules of this agency adopted pursuant to ORS 36.224, or by other state or federal law; and

(B) The parties to the mediation may agree in writing to less confidentiality and greater disclosure of mediation communications.

(c) At least one of the following:

(A) A copy of OAR 731-001-0630 and 731-001-0680 to 731-001-0710;

(B) A summary of OAR 731-001-0630 and 731-001-0680 to 731-001-0710; or

(C) Citations to the rules affecting the confidentiality of mediation communications and a statement indicating where a copy of these rules may be obtained.

(3) Any notice required by this rule is not confidential and may be disclosed.

Stat. Auth.: ORS 36.220, ORS 36.245 & ORS 184.619

Stats. Implemented: ORS 36.220 & ORS 36.245

Hist.: DOT 2-1998, f. & cert. ef. 8-20-98

DIVISION 10

SELECTION AND HIRING OF CONSULTANTS

731-010-0030

Personal Services Contracting

The Department of Transportation adopts OAR 125-065-0030 through 125-065-0110 (effective October 6, 1993), the Department of Administrative Services rules relating to the selection and hiring of consultants, as its selection procedure for all personal service contract consultants.

Stat. Auth.: ORS 184.616 & ORS 279.051

Stats. Implemented: ORS 279.051 & ORS 291.021

Hist.: DOT 3-1994, f. & cert. ef. 11-22-94

DIVISION 15

COORDINATION RULES

731-015-0005

Purpose

The purpose of this division is to establish the procedures used by the Department of Transportation to implement the provisions of its State Agency Coordination Program which assure that Department land use programs are carried out in compliance with the statewide planning goals and in a manner compatible with acknowledged comprehensive plans, as required by ORS 197.180 and OAR 660, Divisions 30 and 31.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0015

Definitions

For the purposes of OAR 731-015-0005 through 731-015-0135:

(1) "Accessory Facility" means a facility which assists the Department in administering, managing, maintaining and operating a transportation facility. Examples include office buildings, weigh stations, maintenance yards, equipment repair shops and quarries.

(2) "Affected City or County" means a city or county that has comprehensive planning authority over a site or area which is directly impacted by a proposed Commission or Department action.

(3) "Affected State and Federal Agencies" means state and federal agencies identified in the Department's state agency coordination program.

(4) "Class 1 Projects" means projects meeting federal criteria for Class 1 Projects under the National Environmental Policy Act (NEPA) and federal agency regulations which carry out NEPA requirements.

(5) "Class 2 Projects" means projects meeting federal criteria for Class 2 Projects under NEPA and federal agency regulations which carry out NEPA requirements.

(6) "Class 3 Projects" means projects meeting federal criteria for Class 3 Projects under NEPA and federal agency regulations which carry out NEPA requirements.

(7) "Commission" means the Transportation Commission.

(8) "Department" means the Department of Transportation.

(9) "DLCD" means the Department of Land Conservation and Development.

(10) "Facility Plan" means a plan for a transportation facility such as a highway corridor plan and an airport master plan.

(11) "Metropolitan Planning Organization" means the organization designated by the Governor to coordinate transportation planning in an urbanized area of the state.

(12) "Modal Systems Plan" means a plan for a statewide system of one or more transportation modes that includes identification of system needs, classification of facilities, and establishment of policies.

(13) "New Transportation Facility" means a transportation facility that does not currently exist. It does not mean the realignment or expansion of an existing transportation facility.

(14) "Transportation Facility" means a facility and all of its parts which are used for conveying and managing the transportation of people and goods. It includes all associated structures and alterations that are necessary to protect public safety and mitigate the environmental effects of a transportation facility.

(15) "Transportation Policy Plan" means the policy plan for the state transportation system encompassing all modes of transportation.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0025

Applicability

The provisions of OAR 731-015-0005 through 731-015-0135 apply the following programs and activities:

(1) Adoption of the Transportation Policy Plan.

(2) Adoption of modal systems plans.

(3) Adoption of transportation facility plans.

(4) Adoption of project plans for Class 1 and Class 3 projects.

(5) Adoption of project plans for Class 2 projects which would involve any of the activities listed OAR 731-015-0035.

(6) Carrying out operations, maintenance and modernization activities, except for repair of damaged highways as authorized by ORS 366.445, which would involve any of the activities listed OAR 731-015-0035.

(7) Issuing any of the following permits or licenses:

(a) Road Approach Permits;

(b) Airport Site Approval and License;

(c) Sign Permits;

(d) Permits for Utility Use of Right of Way.

(8) Renewing permits or licenses in the following circumstances:

(a) Proposed expansion of a licensed airport to permit service to a larger class of aircraft;

(b) Proposed enlargement of a sign.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0035

Activities Which Significantly Affect Land Use

The following activities undertaken by the Department significantly affect land use:

(1) Enlarging an existing transportation facility to increase the level of transportation service provided, relocating an existing

transportation facility, or constructing a new transportation facility.

(2) Constructing a new accessory facility, enlarging an existing accessory facility, or significantly changing the use of an existing accessory facility.

(3) Changing the size of land parcels through the sale of property.

(4) Altering land or structures in a way that significantly affects resources or areas protected by the statewide planning goals or acknowledged comprehensive plans. Examples include:

(a) Placing or disposing of materials in wetlands, waterways or floodplains;

(b) Structurally stabilizing shore lands by placing riprap or by other means;

(c) Draining wetlands by ditching or by other means;

(d) Demolishing or altering a historic bridge or other historic structure;

(e) Removing riparian vegetation.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0045

Coordination Procedures for Adopting the Final Transportation Policy Plan

(1) Except in the case of minor amendments, the Department shall involve DLCD, metropolitan planning organizations, and interested cities, counties, state and federal agencies, special districts, and other interested parties in the development or amendment of the transportation policy plan. This involvement may take the form of mailings, meetings, or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall evaluate and write draft findings of compliance with all applicable statewide planning goals.

(3) The Department shall present to the Transportation Commission the draft plan and findings of compliance with all applicable statewide planning goals.

(4) The Transportation Commission shall adopt findings of compliance with all applicable statewide planning goals when it adopts the final transportation policy plan.

(5) The Department shall provide copies of the adopted final transportation policy plan and findings to DLCD, the metropolitan planning organizations, and others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0055

Coordination Procedures for Adopting Final Modal Systems Plans

(1) Except in the case of minor amendments, the Department shall involve DLCD, metropolitan planning organizations, and interested cities, counties, state and federal agencies, special districts and other parties in the development or amendment of a modal systems plan. This involvement may take the form of mailings, meeting, or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall evaluate and write draft findings of compliance with all applicable statewide planning goals.

(3) If the draft plan identifies new facilities which would affect identifiable geographic areas, the Department shall meet with the planning representatives of affected cities, counties and metropolitan planning organization to identify compatibility issues and the means of resolving them. These may include:

(a) Changing the draft plan to eliminate the conflicts;

(b) Working with the affected local governments to amend their comprehensive plans to eliminate the conflicts; or

(c) Identifying the new facilities as proposals which are contingent on the resolution of the conflicts prior to the completion of

the transportation planning program for the proposed new facilities.

(4) The Department shall present to the Transportation Commission the draft plan, findings of compatibility for new facilities affecting identifiable geographic areas, and findings of compliance with all applicable statewide planning goals.

(5) The Transportation Commission, when it adopts a final modal systems plan, shall adopt findings of compatibility for new facilities affecting identifiable geographic areas and findings of compliance with all applicable statewide planning goals.

(6) The Department shall provide copies of the adopted final modal systems plan and findings to DLCD, the metropolitan planning organizations, and others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0065

Coordination Procedures for Adopting Final Facility Plans

(1) Except in the case of minor amendments, the Department shall involve DLCD and affected metropolitan planning organizations, cities, counties, state and federal agencies, special districts and other interested parties in the development or amendment of a facility plan. This involvement may take the form of mailings, meetings or other means that the Department determines are appropriate for the circumstances. The Department shall hold at least one public meeting on the plan prior to adoption.

(2) The Department shall provide a draft of the proposed facility plan to planning representatives of all affected cities, counties and metropolitan planning organization and shall request that they identify any specific plan requirements which apply, any general plan requirements which apply and whether the draft facility plan is compatible with the acknowledged comprehensive plan. If no reply is received from an affected city, county or metropolitan planning organization within 30 days of the Department's request for a compatibility determination, the Department shall deem that the draft plan is compatible with that jurisdiction's acknowledged comprehensive plan. The Department may extend the reply time if requested to do so by an affected city, county or metropolitan planning organization.

(3) If any statewide goal or comprehensive plan conflicts are identified, the Department shall meet with the local government planning representatives to discuss ways to resolve the conflicts. These may include:

(a) Changing the draft facility plan to eliminate the conflicts;

(b) Working with the local governments to amend the local comprehensive plans to eliminate the conflicts; or

(c) Identifying the conflicts in the draft facility plan and including policies that commit the Department to resolving the conflicts prior to the conclusion of the transportation planning program for the affected portions of the transportation facility.

(4) The Department shall evaluate and write draft findings of compatibility with acknowledged comprehensive plans of affected cities and counties, findings of compliance with any statewide planning goals which specifically apply as determined by OAR 660-030-0065(3)(d), and findings of compliance with all provisions of other statewide planning goals that can be clearly defined if the comprehensive plan of an affected city or county contains no conditions specifically applicable or any general provisions, purposes or objectives that would be substantially affected by the facility plan.

(5) The Department shall present to the Transportation Commission the draft plan, findings of compatibility with the acknowledged comprehensive plans of affecting cities and counties and findings of compliance with applicable statewide planning goals.

(6) The Transportation Commission shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties and findings of compliance with applicable statewide planning goals when it adopts the final facility plan.

(7) The Department shall provide copies of the adopted final facility plan and findings to DLCD, to affected metropolitan plan-

ning organizations, cities, counties, state and federal agencies, special districts and to others who request to receive a copy.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0075

Coordination Procedures for Adopting Plans for Class 1 and 3 Projects

(1) The Department shall involve affected cities, counties, metropolitan planning organizations, state and federal agencies, special districts and other interested parties in the development of project plans. The Department shall include planning officials of the affected cities, counties and metropolitan planning organization on the project technical advisory committee.

(2) Goal compliance and plan compatibility shall be analyzed in conjunction with the development of the Draft Environmental Impact Statement or Environmental Assessment. The environmental analysis shall identify and address relevant land use requirements in sufficient detail to support subsequent land use decisions necessary to authorize the project.

(3) Except as otherwise set forth in section (4) of this rule, the Department shall rely on affected cities and counties to make all plan amendments and zone changes necessary to achieve compliance with the statewide planning goals and compatibility with local comprehensive plans after completion of the Draft Environmental Impact Statement or Environmental Assessment and before completion of the Final Environmental Impact Statement or Revised Environmental Assessment. These shall include the adoption of general and specific plan provisions necessary to address applicable statewide planning goals.

(4) The Department may complete a Final Environmental Impact Statement or Revised Environmental Assessment before the affected cities and counties make necessary plan amendments and zone changes in the following case:

(a) The Final Environmental Impact Statement or Revised Environmental Assessment identifies that the project be constructed in phases; and

(b) The Department finds:

(A) There is an immediate need to construct one or more phases of the project. Immediate need may include, but is not limited to, the facility to be improved or replaced currently exceeds or is expected to exceed within five years the level of service identified in the Oregon Highway Plan; and

(B) The project phase to be constructed meets a transportation need independent of the overall project, is consistent with the purpose and need of the overall project as identified in the FEIS, and will benefit the surrounding transportation system even if no further phases of the project are granted land use approval.

(5) If a Final Environmental Impact Statement or Revised Environmental Assessment is completed pursuant to section (4) of this rule, all necessary plan amendments and zone changes associated with the particular phase of the project to be constructed shall be made by the city or county prior to constructing that phase of the project.

(6) If compatibility with a city or county comprehensive plan cannot be achieved, the Department may modify one or more project alternatives to achieve compatibility or discontinue the project.

(7) The Commission or its designee shall adopt findings of compatibility with the acknowledged comprehensive plans of affected cities and counties when it grants design approval for the project. Notice of the decision shall be mailed out to all interested parties.

(8) The Department shall obtain all other land use approvals and planning permits prior to construction of the project.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 197.180
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90; DOT 3-1998, f. & cert. ef. 12-18-98

731-015-0085

Coordination Procedures for Adopting Plans for Class 2 Projects Determined to Significantly Affect Land Use

The procedures in this section shall be followed when the Department determines that a Class 2 project would significantly affect land use in accordance with OAR 731-015-0035.

(1) Planning officials of affected cities and counties shall be contacted at the start of project planning to identify any possible compliance or compatibility conflicts and ways to avoiding conflicts.

(2) The Department shall attempt to avoid any identified compliance or compatibility conflicts as it develops its plans.

(3) Planning officials of affected cities and counties shall be requested to review preliminary final plans to identify whether any local land use approvals are needed and whether any of the acknowledged comprehensive plan's general provisions would be substantially affected. If no local planning approvals are required and if the plan's general provisions would not be substantially affected the Department shall conclude that the project is compatible. If no comments are received from an affected local jurisdiction within 15 days of the Department's request for a compatibility determination, the Department shall deem that the preliminary project plans are compatible with the acknowledged comprehensive plan for that jurisdiction. The Department may extend the reply time if requested to do so by an affected city or county.

(4) If any local planning approvals are required the Department shall either modify its project plans so as to not require approvals, or shall apply for the necessary approvals.

(5) If the affected city or county does not grant approval, the Department may:

- (a) Modify the project plans so as to not require approval;
- (b) Discontinue further work on the project; or
- (c) Appeal the city or county decision.

(6) The Department shall obtain local planning approvals prior to construction of the project.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0095

Coordination Procedures for Constructing or Improving Buildings in Salem Area

The Department shall satisfy its goal compliance and plan compatibility responsibilities for constructing or improving buildings in areas subject to the jurisdiction of the Capitol Planning Commission by adhering to the Capitol Planning Commission's land use coordination rules in OAR Chapter 110, Division 10, and the procedure contained in the Capitol Planning Commission's certified State Agency Coordination Program.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0105

Coordination Procedures for Operations, Maintenance and Modernization Activities

The procedures in this section shall be followed when the Department determines that an operations, maintenance or modernization activity would significantly affect land use in accordance with OAR 731-015-0035 unless compliance with the statewide planning goals and compatibility with acknowledged comprehensive plans has been established through application of OAR 731-015-0075 or OAR 731-015-0085.

(1) The Department shall consult planning officials of the affected city or county to determine whether any local land use approvals are required to carry out the proposed activity.

(2) If any local planning approvals are required, the Department shall either modify the proposed activity so as to not require approval, or shall apply for the necessary approvals.

(3) If the approvals are not granted the Department may:

- (a) Modify the proposed activity so as to not require permits;
- (b) Not do the proposed activity; or
- (c) Appeal the local decision.

Stat. Auth.: ORS 184 & ORS 197
 Stats. Implemented: ORS 197.180
 Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0110

Coordination Procedures for the Disposal of Surplus Right of Way

(1) The Department shall apply LCDC Goal 17 implementation requirement number 6 as well as applicable statutes when determining whether to declare right of way as surplus.

(2) The Department shall notify potential buyers of their responsibility to establish compliance and compatibility.

(3) The Department shall obtain a written statement from a planning official of the affected city or county that all land use planning approvals have been obtained or that the planned sale complies with the acknowledged comprehensive plan but no local land use approvals are needed.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0115

Permit Program Procedures

(1) The Department shall notify applicants for permits or licenses or renewals of permits or licenses listed in OAR 731-015-0025 of their responsibility to demonstrate compliance and compatibility.

(2) The Department shall not issue a permit unless certification of compatibility is demonstrated by the applicant. The Department may deny, condition or further restrict a permit that is compatible as necessary to carry out applicable Department rules and statutes.

(3) Certification shall be documentation that all local land use planning approvals have been obtained or a written statement by a planning official of the affected city or county that the application complies with the acknowledged comprehensive plan but no local land use approvals are needed.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0125

Referral of Compatibility Disputes to the Land Conservation and Development Commission

If a compatibility conflict persists after pursuing the compatibility procedures listed in OAR 731-015-0045 through 731-015-0115, the Department shall request that the Land Conservation and Development Commission make a compatibility determination in accordance with OAR 660-030-0070(7) through (12).

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

731-015-0135

Statewide Goal Compliance and Acknowledged Plan Compatibility for New or Amended Rules and Programs Significantly Affecting Land Use

(1) The Commission and Department shall follow the procedures in OAR 660-030-0075 to assure that new or amended rules and programs comply with the requirements of ORS 197.180 and OAR Chapter 660, Division 30.

(2) The Department shall determine whether new or amended rules and programs affect land use pursuant to OAR 660-030-0005(2) and OAR 731-015-0035.

(3) This section shall not apply to the adoption of temporary rules or programs.

Stat. Auth.: ORS 184 & ORS 197

Stats. Implemented: ORS 197.180

Hist.: DOT 5-1990, f. & cert. ef. 9-26-90

Purpose and Scope

Establishing methods of determining gross weights for the Oregon Vehicle Code.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 801.055

Stats. Implemented: ORS 801.055

Hist.: DOT 2-1992(Temp), f. & cert. ef. 9-1-92; DOT 3-1992, f. & cert. ef. 11-25-92

731-020-0010

Weighing of Vehicles

(1) For the purpose of determining any gross weight, actual scale weights shall govern. In the absence of information as to scale weights or of convenient facilities for ascertaining scale weights, the weights furnished by dealers, manufactures or their agents, as to the weights of vehicles and parts of vehicles, and bills of lading or cargo manifests as to weights of loads, may be accepted as the weights thereof, but such weights shall be subject at all times to verification by actual weights subsequently ascertained.

(2) For any of the purposes of the **Oregon Vehicle Code**, any gross weight may be measured and determined as follows:

(a) The gross weight of any wheel may be ascertained by placing a portable wheel weigher underneath the wheel and raising it off the surface of the ground, or by placing any wheel on a platform scale in a position so that the other wheels of the vehicle do not bear upon the platform of the scale;

(b) The gross axle weight of any axle may be ascertained by placing a portable wheel weigher underneath the outer wheels at both ends of the axle and raising all the wheels of the axle off the surface of the ground so as to weigh the entire axle at one time, or otherwise in the usual manner of the use of weighing devices, or may be ascertained by placing all the wheels of any axle on a platform scale in a position so that the other wheels of the vehicle do not bear upon the platform of the scale;

(c) The gross weight of any tandem axles and the gross weight of any group of axles shall be the sum of the gross axle weights of all the axles comprising the tandem axles or the group of axles, or may be ascertained by placing all the wheels of the tandem axles or the group of axles on a platform scale in a position so that the other wheels of the vehicle or combination of vehicles do not bear upon the platform of the scale. If it is not practical to place only the wheels of the tandem axles or groups of axles in a position so that other wheels of the vehicle or combination of vehicles do not bear upon the platform of the scale, other wheels of the vehicle or combination of vehicles may be placed on the platform of the scale and the gross weight of the tandem axles or the gross weight of the group of axles shall be determined by subtracting from the gross weight of all the wheels upon the platform of the scale the gross weight of the wheels not comprising the tandem axles or the groups of axles;

(d) The gross weight of any vehicle or combination of vehicles shall be the sum of the gross axle weights of all the axles of the vehicle or combination of vehicles, or may be ascertained by placing all the wheels of a vehicle or combination of vehicles on a platform scale.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 801.055

Stats. Implemented: ORS 801.055

Hist.: DOT 2-1992(Temp), f. & cert. ef. 9-1-92; DOT 3-1992, f. & cert. ef. 11-25-92

DIVISION 20

METHODS FOR ESTABLISHING GROSS WEIGHTS OF TRUCKS

731-020-0000

DIVISION 30

OREGON TRANSPORTATION INFRASTRUCTURE FUND

731-030-0010

Purpose of the Rules

OAR 731-030-0010 to 731-030-0160 establish the procedures and requirements for the administration of the Oregon Transportation Infrastructure Fund.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 367.383

Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 184.190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 367.383 & United States Code, Public Law 104-59, Section 350

Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0020

Statutory Authority

Oregon Revised Statutes provide authority for the Department to operate the Oregon Transportation Infrastructure Fund. This authority is located in a number of statutes:

(1) Receive and account for federal funds. Oregon Revised Statutes (ORS) 184.617 and 366.705 to ORS 366.735 provide very broad statutory authority to receive federal funds in almost any form.

(2) Highway Account. Statutory authority permitting the Department to establish a separate account within the State Highway Fund for the Oregon Transportation Infrastructure Fund is provided pursuant to ORS 184.636, 184.638, 366.505, and 366.735.

(3) Intergovernmental Agreements. According to the provisions of ORS 366.770 and 366.775, the Department may enter into intergovernmental agreements with local jurisdictions "upon terms and conditions mutually agreed to" for highway related projects. There is also broad authority to enter into intergovernmental agreements generally in ORS Chapter 190. Thus the Department may loan funds, charge interest, and provide financial assistance. Under ORS 367.655 and 367.700 to ORS 367.750, the Department may incur bond indebtedness and loan moneys to cities and counties.

(4) Other Accounts. ORS 184.636 to ORS 184.638, ORS 184.733, and ORS 366.505 provide authority for the Department to establish accounts to administer its highway and transit programs.

(5) Transit Account. ORS 184.733 establishes an account in the State Treasury, separate and distinct from the General Fund, known as the Department of Transportation Public Transportation Development Fund. This account is appropriated continuously to the Department and is for developing and improving public transportation systems. All interest accruing to the funds in that account is captured and retained in the account:

(a) ORS 184.689(9) empowers the Department to assist local government, private and nonprofit operators of passenger transportation systems. The Department may assist in such activities as, planning, experimentation, financing, design, construction, acquisition, lease, preservation, improvement, operation and maintenance of public transportation systems. The assistance may include loans, grants, or the provision of equipment or facilities; and

(b) ORS 184.730 and ORS 184.733 provide sufficient authority for loans to any "public transportation entity." These include any city, county, transportation district, mass transit district, metropolitan service district or private nonprofit corporation operating a public transportation system. In addition, the Department may make agreements with public and private employers to operate transportation development programs. The Department may loan from its Public Development Transportation Fund to public and to some private entities.

(6) Repayment Account. Pursuant to ORS 366.505 and Public Law 104-59, Section 350, repayments from loans shall reside in the state highway fund unless the Chief Financial Officer designates another fund.

(7) Toll Roads. ORS Chapter 383 provides broad authority for the Department to enter into agreements with public entities, public/private partnerships and private entities to fund toll roads and bridges.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383

Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0030

Definitions

(1) "Applicant" means an Agency or a Municipality.

(2) "Agency" means any department, agency or commission of the State of Oregon, including the Department.

(3) "Advisory Committee" means a committee appointed by the Region Manager and comprised of local government and other community representatives in addition to Department staff.

(4) "Bond Counsel" means a legal firm hired to advise the Department regarding the legal and tax aspects of the sale of Infrastructure Bonds.

(5) "Chief Financial Officer" means the fiscal officer defined in ORS 184.637 and ORS 184.638 who is also the Manager of the Financial Services Branch of the Department or designated staff.

(6) "Commission" means the Oregon Transportation Commission.

(7) "Debt Service Reserve" means unobligated moneys from the Infrastructure Fund set aside in an account in the Infrastructure Fund, to be used as debt service for Infrastructure Bonds, in the event that debt service is not met by Recipients.

(8) "Department" means the Oregon Department of Transportation.

(9) "Director" means the Director of the Oregon Department of Transportation.

(10) "Financial Advisor" means a consultant providing the Department with information and advice relative to the structure, timing, marketing, pricing, terms and bond ratings for the sale of Infrastructure Bonds.

(11) "Highway Account" means an account within the State Highway Fund defined in ORS 366.505 which receives federal and state money for use by the Infrastructure Fund.

(12) "Infrastructure Assistance" means Infrastructure Loans and Other Assistance.;

(13) "Infrastructure" means any construction project, facility, property or program that provides the foundation or basic framework by which an entity provides transportation services to the public.

(14) "Infrastructure Bonds" means bonds authorized by ORS 367.226 to 367.242, 367.370 to 367.430, 367.550 to 367.600, or 367.605 to 367.670 which are issued to fund Infrastructure Assistance and are deposited in the Highway Account.

(15) "Infrastructure Fund" means the Oregon Transportation Infrastructure Fund, which consists of the Highway Account, the Transit Account, the Repayment Account and such other accounts as the Chief Financial Officer deems necessary to administer the Program.

(16) "Infrastructure Loan" means a loan of amounts in the Infrastructure Fund to finance a Transportation Project. The loan may be in the form of a lease purchase or similar agreement.

(17) "Lease" means any contract or other agreement by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent. Lease may refer to a lease purchase agreement.

(18) "Municipality" means any of the following located in the State of Oregon: A city, county, road district, school district, special district, metropolitan service district, urban renewal agency, the Port of Portland, a port authority, any similar entity, and an intergovernmental corporation organized under ORS 190.010.

(19) "Other Assistance" means any use of amounts in the Infrastructure Fund to provide financial assistance for Transportation Projects other than an Infrastructure Loan. Other Assistance includes, but is not limited to, use of amounts in the Infrastructure Fund to fund leases, pay issuance costs or provide credit enhancement or other security for bonds, leases or loans obtained by municipalities or other entities to fund Transportation Projects.

(20) "Program" means the program authorized by United States Code, Public Law 104-59, Section 350 under which the

United States Secretary of Transportation designated Oregon as a state infrastructure bank pilot state, which program was approved and adopted by the Commission.

(21) "Project Agreement" means a legally binding contract between the Department and Recipient that sets out the terms and conditions for award of Infrastructure Loans or Other Assistance.

(22) "Public Transportation Entity" means an entity defined in Oregon Revised Statutes 184.675(7).

(23) "Recipient" means an Applicant that has received an Infrastructure Loan or Other Assistance.

(24) "Region" means one of the geographic areas established by the Department to administer transportation programs.

(25) "Region Manager" means the administrative head of a Region or designated staff.

(26) "Repayment Account" means an account within the State Highway Fund which receives loan payments, fees and other charges due from any and all Infrastructure Assistance.

(27) "Staff" means Department staff assigned by the Chief Financial Officer to provide Infrastructure Loans and Other Assistance.

(28) "State Tollway Account" means the account established in Oregon Revised Statutes 383.009.

(29) "Transit Account" means an account within the Transportation Development Fund defined in ORS 184.733 which receives federal and state funds for use by the Infrastructure Fund.

(30) "Transportation Project" means any project or undertaking which facilitates any mode of transportation within the State. Transportation projects include, but are not limited to, highway, transit, bicycle and pedestrian paths, bridges and ways, and other facilities which facilitate the transportation of materials, animals or people.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0040

Purpose of the Oregon Transportation Infrastructure Fund

(1) The purpose of the Oregon Transportation Infrastructure Fund is to fund transportation solutions, leverage additional funds into transportation, and encourage innovative financing techniques in order to further Oregon's livability and economic competitiveness. The Oregon program is one of ten state pilot projects authorized under United States Code, Public Law 104-59, Section 350. The Fund is part of a national effort to demonstrate state infrastructure banks can increase funding available for transportation projects.

(2) The program arises out of the need to improve, rehabilitate and renovate transportation facilities. This need increases while federal, state and local financial resources are constant or declining. Federal grants for transportation are not growing. State and local sources of transportation funding have not kept pace with the growth in needed infrastructure. Similar financial constraints affect both state facilities and facilities owned by counties, cities, transit providers and special districts.

(3) The mission of the Infrastructure Fund is to provide loans and other financial assistance to improve transportation infrastructure in the state. To accomplish this mission, the Department shall operate the Infrastructure Fund as a self-sustaining, growth oriented fund. It shall also ensure projects satisfy all appropriate federal, state and local planning and programming requirements.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0050

Administration of Funds

(1) The Chief Financial Officer shall conduct the activities necessary to manage the Infrastructure Fund.

(2) The Commission capitalizes the Infrastructure Fund with available federal and state money it wishes to designate for this purpose and with the sale of Infrastructure Bonds. Interest earnings on fund balances and loan repayments also contribute to capital.

(3) Moneys in the Infrastructure Fund may include moneys transferred from the State Highway Fund, from federal funds identified in Public Law 104-59, Section 350, (a) (2) through (a) (4), from funds otherwise available to the Commission for transit capital purposes, from funds contributed by local transit providers, as well as from any federal, state or other grants or donations.

(4) The Department may expend funds from the Infrastructure Fund to make Infrastructure Loans.

(5) The Department may expend funds from the Infrastructure Fund to provide Other Assistance.

(6) The first expenditure of federal funds from either the Highway Account or the Transit Account shall be for projects eligible for Federal aid under Title 23 or Title 49 of the United States Code. These projects shall meet all federal contracting requirements. Any exception to these requirements shall be by agreement with appropriate federal and state officials.

(7) The Department may expend funds from the Infrastructure Fund to establish a Debt Service Reserve to support the credit pledges of a Recipient and to reduce the interest rate paid on loans.

(8) The Department may expend moneys from the Fund to support the sale of Infrastructure Bonds. Such expenditures may include the payment of all costs associated with the issuance of an Infrastructure Bond including but not limited to Bond Counsel and Financial Advisor fees, underwriter fees and discounts, printing and publishing, and other costs as deemed necessary to secure the sale of an Infrastructure Bond.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0060

Pilot Stage and Infrastructure Bonds

(1) During the first six months from the effective date of OAR 731-030-0010 to 731-030-0160, the Department shall:

- (a) Make Infrastructure Loans;
- (b) Provide Other Assistance only to fund Leases; and
- (c) Not issue Infrastructure Bonds.

(2) After the first six months, the Department shall:

- (a) Make Infrastructure Loans;
- (b) Offer such Other Assistance as the Chief Financial Officer deems appropriate; and

(c) Request the State Treasurer to issue Infrastructure Bonds only if, in the judgment of the Chief Financial Officer, the demand for Infrastructure Assistance surpasses federal and state funds designated to the bank and only upon the Commission's approval.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0070

Eligible Applicants

(1) The Department shall accept applications for Infrastructure Loans or Other Assistance from any Agency or Municipality.

(2) Private entities shall not be eligible applicants except for Public Transportation Entities and except for private entities applying through the State Tollway Account.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0080

Applicant's Handbook

(1) The Department has prepared a handbook for Applicants. The handbook addresses application procedures, Applicant eligibility, project evaluation, types of Infrastructure Assistance available, financing rates, terms and limits and other applicable information. It is called the Applicant's Handbook Oregon Transportation Infrastructure Bank.

(2) The Chief Financial Officer may revise the Applicant's Handbook as needed or judged helpful.

(3) The materials in the Applicant's Handbook are hereby adopted by reference.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0090

Application Procedures

(1) An eligible Applicant may submit an application for Infrastructure Assistance at any time.

(2) The Department may establish a cut off date for the first round of applications. Grouping all initial applications from across the state is done to allow fair competition by all applicants for available funds.

(3) The Department may establish additional rounds of applications, if the Chief Financial Officer deems it appropriate to do so.

(4) All applications received before an established cut-off date shall be evaluated as part of the same process on published criteria by a Region and by Staff.

(5) Applications received after an established cut-off date shall be evaluated within approximately 60 days of receipt on published criteria by a Region and by Staff.

(6) The Department shall set forth in the Applicant's Handbook specific information required to qualify and evaluate the project and to ascertain the credit strength of the Applicant.

(7) The Department shall assign the application to a Region for evaluation of technical and engineering criteria and to Staff for evaluation of financial and economic criteria.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0100

Region Advisory Committees

(1) Each Region Manager shall appoint an advisory committee comprised of local government and other community representatives in addition to Department staff. The responsibility of the advisory committee is to evaluate applications on technical, engineering and planning criteria, rank applications when more than one is being considered, and to recommend to the Regional Manager approval or disapproval of each application. Appointments of local government and citizen representatives shall be made in cooperation with local governments. The Region Manager may utilize an existing committee for this purpose, provided the requirements of this section are met.

(2) To be qualified to serve on the Advisory Committee a person must be an elected or appointed official of an Agency or Municipality with responsibilities for transportation, or be representative of the community recognized for interest and expertise in transportation, or be a member of the Department's staff appointed to the Advisory Committee by the Region Manager.

(3) The Advisory Committee shall adhere to the Oregon Public Meetings Laws at all meetings and shall have at least three voting members. No more than one-third of voting members may be Department staff.

(4) The Advisory Committee shall consider all the projects within the Region which are qualified for an Infrastructure Loan or Other Assistance.

(5) The Advisory Committee shall appropriately consider transportation policy and modes when evaluating applications.

(6) The voting members of the Advisory Committee shall:

(a) Evaluate each project or proposal according to the criteria published by the Department and assigned by the Department for evaluation to the Region;

(b) Recommend approval or disapproval of each project or proposal; and

(c) Where more than one project is evaluated, recommend how the projects or proposals should rank.

(7) The Region Manager shall decide the final evaluation and ranking of all projects in the Region, taking into consideration the advisory committee's recommendation.

(8) The Region Manager shall notify the Staff of the make up of the Advisory Committee and shall inform Staff of the results of evaluations and rankings in a format developed or approved for this purpose. The intent is that a uniform method of evaluation and reporting be used for all advisory committees statewide.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 - U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0110

Evaluation Procedures

(1) Staff shall develop criteria with uniform benchmarks for statewide use. Conformity to land use and transportation planning laws and rules will be one of the essential criteria.

(2) Staff shall assign particular technical, engineering and planning criteria to the Region for evaluation.

(3) Staff shall evaluate the economic and financial criteria for each project, seeking assistance from the Oregon Economic Development Department and the Department of Environmental Quality or from other subject matter experts where appropriate.

(4) Staff shall combine evaluations into a combined score. The combined score may change the order of projects from the order established by a Region.

(5) Staff shall recommend to the Chief Financial Officer which projects to fund based on an analysis of such factors as the combined score, statewide equity, the availability of funds, and Program cash flow. Staff may request additional information from an Applicant or the Region to assist in making a recommendation.

(6) The Chief Financial Officer shall determine which projects best meet the project selection criteria and recommend those projects to the Commission.

(7) The Commission shall approve or make the final selection of projects.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0120

Project Agreements, Interest Rates and Charges

(1) The Department shall give Infrastructure Assistance from the Infrastructure Fund by entering into a Project Agreement with the Recipient.

(2) The Chief Financial Officer shall determine the amount, type, interest rate, and terms of financing awarded to an Applicant for a Transportation Project. In most cases for Agencies and Municipalities, interest rates will approximate tax exempt rates for similar obligations. In determining interest rates, the Chief Financial Officer may adjust the rate to reflect the evaluation of the Infrastructure Project and the effect of the rate upon the Applicant's ability to fund the project.

(3) The Chief Financial Officer shall set forth in each Project Agreement any fees or charges necessary to recover Department costs.

(4) The Chief Financial Officer shall consider the financial status of the Infrastructure Fund and may delay final award of funds to any Transportation Project until sufficient funds are available. The Department reserves the right to investigate and recommend other sources of funds for all or part of a proposed Transportation Project.

(5) Loans made to a Transportation Project can only be drawn as needed to pay for eligible costs. The time between draw down and disbursement of funds shall be as brief as is administratively feasible.

(6) Eligible costs include the cost of acquiring, designing, contracting, building and installing any Transportation Project. Other costs may be included in a Project Agreement if mutually agreed. When federal money is used and where appropriate, the requirements of federal law and rules regarding reimbursable costs will be followed.

(7) Project Agreements shall generally not include grants. Infrastructure Loans may be made in coordination with grants from funds otherwise available to the Department. The Department and Recipient jointly may determine the order in which the Recipient shall spend grant funds and loan funds.

(8) The Department shall provide each Recipient with information which guides local record keeping and Transportation Project reporting activities.

(9) If the Department determines that all the loaned funds are not needed to complete a Transportation Project, the Department may accept early repayment from the Recipient and discharge the Recipient's obligation. The Department shall consider the financial impact of early repayment upon the Infrastructure Fund and may assess the Recipient a charge designed to offset any loss to the Infrastructure Fund from the early repayment.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0130
 Accounting, Reporting and Auditing Requirements**

(1) The Department shall maintain an accounting system for the Infrastructure Fund that separately accounts for administrative costs, loans, and assistance. The Infrastructure Fund shall be managed so as to comply with generally accepted accounting principles and practices.

(2) Recipients shall separately account for all Infrastructure Assistance moneys in project accounts in accordance with generally accepted accounting standards. The Department reserves the right to audit, monitor or otherwise review all project records.

(3) The Department shall compile a report on the Program and distribute the report to Recipients no later than 90 days after the end of the Federal fiscal year. The report shall identify Recipients, the amounts of Infrastructure Assistance, Infrastructure Assistance interest and repayment terms and project categories. The report shall include a statement on how well the Department has met its goals for the program and the financial condition of the Highway Account and the Transit Account.

(4) Recipients shall provide information required for this report in formats designed by Staff.

(5) The Department, in cooperation with the Secretary of State, shall conduct or cause to be conducted an annual independent financial and compliance audit of its operations. This audit may be conducted in accordance with the Single Audit Act of 1984. This audit shall be completed within one year of the end of the state fiscal year.

(6) The Department and Recipients shall observe the requirements of state law for retaining and disposing of records except that the Department shall retain all official project files until all Infrastructure Assistance has been repaid and necessary audits have been performed.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
 Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
 Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

**731-030-0140
 Sanctions**

(1) The Department may invoke sanctions against a Recipient that fails to comply with the terms and conditions in the Project Agreement. Sanctions shall not be imposed by the Department until the Recipient has been notified in writing of deficiencies and has been given a reasonable time to respond and correct the deficiencies noted. The following circumstances may warrant sanctions:

(a) Recipient action or lack of action causes the Department to fail to take appropriate corrective action or submit a compliance plan to the Federal Highway Administration or the Federal Transit Administration within 60 days of a Federal notice of non-compliance;

(b) State or Federal statutory requirements have not been met;

(c) Transportation Project activities have not begun or progressed as committed in the Project Agreement;

(d) Failure to comply with local or state land use or transportation planning laws or rules;

(e) Any third party agreements relating to the Transportation Project are not legally binding within six months of the award of Infrastructure Assistance;

(f) There is a significant deviation from the Project Agreement;

(g) The Department finds that significant corrective actions are necessary to protect the integrity of the Transportation Project funds, and those corrective actions are not, or will not be, met within a reasonable time; or

(h) A Recipient defaults on Infrastructure Assistance payments.

(2) The Department may impose one or more of the following sanctions:

(a) Withhold from future payments all unexpended Department funds or an amount equal to the amount under dispute until corrective action is taken or until the Recipient provides an acceptable plan;

(b) Bar a Recipient from applying for future Infrastructure Assistance;

(c) Revoke an existing award of Infrastructure Assistance;

(d) Require return of unexpended Infrastructure Assistance funds;

(e) Require repayment of expended Infrastructure Assistance funds;

(f) Bar a Recipient from eligibility for Department grant programs;

(g) Step in and take over administration of a Transportation Project;

(h) Withhold other state funds such as an entity's apportionment of State Highway Fund revenues due under Oregon Revised Statutes 366.524; or

(i) Other remedies that may be incorporated into Project Agreements.

(3) The remedies in this rule are cumulative, are not exclusive, and are in addition to any other rights and remedies provided by law or under the Project Agreement.

(4) The Recipient shall be responsible for taking all action necessary to enforce the terms of the Project Agreement against any private participant that fails to comply with the Project Agreement, and to recover on behalf of the Department any liabilities that may arise as the result of the breach of such Project Agreement by a private participant. Nothing in this paragraph shall restrict the Department's right to enforce independently the terms of any Project Agreement or to recover any sums that may become due as the result of a breach of such Project Agreement.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383

Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0150

Waivers

The Chief Financial Officer may waive non-statutory requirements of this Program if it is demonstrated such a waiver would serve to further the goals and objectives of the Program.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

731-030-0160

Appeals

Appeals of local government decisions regarding a Transportation Project application must be made to the appropriate local governing entity, for example to the county, city or special district making the decision.

Stat. Auth.: ORS 184.619, ORS 367.655 & ORS 383
Stats. Implemented: ORS 184.617, ORS 184.636, ORS 184.638, ORS 184.689, ORS 184.730, ORS 184.733, ORS 190, ORS 366.505, ORS 366.705 - ORS 366.735, ORS 366.770, ORS 366.775, ORS 367.655, ORS 367.700 - ORS 367.750, ORS 383 & U.S. Code, Public Law 104-59, Sec. 350
Hist.: DOT 1-1997, f. & cert. ef. 1-17-97

DIVISION 40

TOLLWAY PROJECTS

731-040-0010

Purpose

OAR 731-040-0010 through 731-040-0080 describe the process for initiating, evaluating, authorizing and administering tollway projects proposed by private entities; and local, regional or state government. They include requirements for submitting project proposals; guidelines for considering financial and other issues; and requirements for consistency with other local, state and federal policies and processes. OAR 731-040-0010 through 731-040-0080 shall be cited as the Tollway Project Rules.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015
Stats. Implemented: ORS 383
Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0020

Definitions

As used in OAR 731-040-0020 through 731-040-0080:

(1) "Agreement" means a memorandum of agreement executed by the Oregon Department of Transportation with any private entity or governmental agency to implement the purpose of ORS Chapter 383 or the Tollway Project Rules.

(2) "Department" means the Oregon Department of Transportation.

(3) "Environmental impacts and assessment" means the assessment of impacts on the environment and any proposed mitigation of impacts, consistent, at a minimum, with state/federal rules, regulations and standards.

(4) "Financial and institutional capacity" means the current and projected financial, personnel and other institutional resources available to a private entity or local or regional government necessary to finance and administer a proposed project.

(5) "Justification" means a concise statement that, at a minimum, describes why the proposed facility is needed, the specific problems that will be resolved, specific benefits expected to accrue to the general public, and expected impacts on existing/planned transportation facilities near the proposed facility.

(6) "Liability-creating events" means events that create potential liability for the Department, particularly events where the determination of who is liable could be disputable. Examples

include, but are not limited to, accidents due to material or design defects or construction-related events.

(7) "Local and statewide economic impacts" means estimated impacts on employment, retail sales, tax revenues and other economic indicators for the state and local jurisdictions in which the proposed project is located.

(8) "Minimum STIP requirements" means requirements imposed by the Department and local or regional governments through the Statewide Transportation Improvement Program (STIP) as defined in section (15) of this rule.

(9) "MPO" means any metropolitan planning agency in Oregon designated by the state or federal government as responsible for transportation planning and coordination within its jurisdiction.

(10) "Perfected security agreement" means an agreement giving the Department a clear and senior claim on a security in the event of default or other condition identified in the agreement.

(11) "Private entity" means any nongovernmental entity, including a corporation, partnership, company or other legal entity or any natural person.

(12) "Reasonable rate of return on investment" means a percentage rate calculated in an agreement that establishes an annual average profit rate. This rate will be negotiated between the Department and any other party to the agreement and calculated pursuant to OAR 731-040-0070(4), as well as any other procedures developed by the Department to implement the Tollway Project Rules.

(13) "Regional decision-making body" means any MPO, Council of Governments or other regional body recognized by the State of Oregon as having authority to make binding regional decisions regarding transportation and land use planning.

(14) "RTP" means a Regional Transportation Plan adopted by Metro or any other MPO.

(15) "STIP" means the Statewide Transportation Improvement Program as adopted and implemented by the Department and the Oregon Transportation Commission (OTC). Rules and procedures for implementing the STIP are found in the STIP Development Manual adopted by the Department.

(16) "Tollway Account" means a separate account within the State Highway Fund as defined in ORS 383.009.

(17) "TSP" means any adopted regional, county or local Transportation System Plan.

(18) "Unit of government" means any department or agency of the state, or any agency, office or department thereof, and any city, county, district, port or other public corporation organized and existing under statutory law or under a voter-approved charter.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015
Stats. Implemented: ORS 383
Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0030

Initiation by Public and Private Entities, Initial Review and Administrative Fee

(1) A unit of government may propose a tollway project at any time. In addition to information required for the STIP process, local governments shall provide information on the following:

- (a) Estimated local funding contributions;
- (b) Estimated portion of costs to be covered by toll revenues;
- (c) Proposed sources of additional funding;
- (d) Justification for project to be constructed as tollway;
- (e) Proposed ownership and financing arrangements; and
- (f) Financial and institutional capacity to meet proposed responsibilities for finance, operation, maintenance and administration.

(2) Department staff may assist units of government in obtaining information required for proposals.

(3) Private entities may propose tollway projects at any time. Proposals shall be submitted to the Department regional manager for the region in which the majority of the proposed project, measured in lane-miles, is located.

(a) If a proposed project is already included in the STIP development program or a local transportation system improvement plan, the proposer shall submit the following information:

(A) Qualifications and experience in previous similar projects;

(B) Size and form of proposed financial commitment, if any, from the government sector and private sources;

(C) Financial and institutional capacity to meet proposed responsibilities for finance, operation, maintenance and administration;

(D) Proposed form, extent and duration of government participation; and

(E) Time schedule for completion.

(b) If a proposed project is not already included in the STIP development program or any local or regional transportation system plan (TSP), the proposer shall submit the information required in subsection (a) of this section, as well as information required by local, regional or state transportation planning agencies needed for the STIP process.

(c) Private entities shall agree to cooperate with the Department and local or regional governments in their review and evaluation of proposals through the STIP process.

(4) Department staff shall review proposals submitted by units of government or private entities.

(a) The Department shall review proposals submitted by units of government to determine if the proposing agency has adequately demonstrated it can meet its proposed responsibilities for financing, operating, maintaining and administering the project. Upon making such a determination, the Department shall do the following:

(A) If the project is in the STIP development program, the Department shall proceed to further detailed review pursuant to OAR 731-040-0040; or

(B) If the project is not already in the STIP development program, Department staff shall determine whether the project could meet minimum STIP requirements. If the Department makes such a determination, it shall proceed to further detailed review pursuant to OAR 731-040-0040.

(b) The Department shall review proposals submitted by private entities to determine if the proposer has demonstrated the experience and capacity to build, operate or maintain the proposed facility and the project. Upon making such a determination, the Department shall do the following:

(A) If the project is in the STIP development program, the Department shall proceed to further detailed review pursuant to OAR 731-040-0040; or

(B) If the project is not already in the STIP development program, Department staff shall determine whether the project could meet minimum STIP requirements. If the Department makes such a determination, it shall proceed to further detailed review pursuant to OAR 731-040-0040.

(c) Proposals submitted for further review pursuant to subsections (a) and (b) of this section also shall be forwarded for review by the Department to local or regional governments for cities, counties and regions in which the project is located.

(5) The Department shall charge the private entity the following fees for reviewing any project proposed by the private entity to a local, regional or state government or other public agency:

(a) For initial review pursuant to subsection (3)(b) of this rule, the administrative fee shall be \$5,000; and

(b) For projects that are approved for detailed consideration and evaluation, the additional fee for review pursuant to OAR 731-040-0040, shall be \$40,000.

(6) Review fees will be deposited in the State Tollway Account and used to cover the cost of reviewing proposals.

(7) The Department may utilize a competitive process in soliciting or evaluating proposals from private entities.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0040

Evaluation

(1) Projects not already included in the STIP construction program shall be evaluated for inclusion in the STIP construction program by the Department or the appropriate MPO or other recognized regional decision making body. After the Department has made a determination, pursuant to OAR 731-040-0030, that a project is feasible and the proposer can meet its proposed responsibilities for financing, operating, maintaining and administering the proposed project, the proposer shall submit additional information to be used in the STIP evaluation process, including:

(a) Engineering information related to alignment, cross-section, access points and other related factors;

(b) Right-of-way needs;

(c) Detailed finance plan and cost information;

(d) Environmental impacts and assessment, including local and statewide economic impacts; and

(e) Consistency with applicable federal, state and local plans and policies, including:

(A) Local and regional TSPs;

(B) Local and regional land use and comprehensive plans;

and

(C) All other plans and policies referenced in STIP consistency requirements.

(2) Evaluation criteria and procedures shall be the same as those used for other STIP construction, TSP or RTP projects or other regional transportation decision-making processes, except as follows:

(a) Until formally incorporated in existing processes, criteria and procedures also must include:

(A) Consideration of local and statewide economic impacts;

(B) Comparison of traffic congestion and economic conditions in communities served by competing tollways financed in part by state funds; and

(C) Other provisions set forth in the Tollway Project Rules.

(b) Unless already included in the evaluation process, availability of funds from toll revenues or other sources of funding not budgeted through the STIP process shall be considered in ranking projects. Given a financially constrained STIP, the availability of toll or other local revenues shall improve a project's ranking to the extent that they enhance other elements of the state transportation system or the system as a whole.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0050

Authorization

Approval by the Oregon Transportation Commission through the STIP process shall constitute authorization of a tollway project.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0060

Administration of Projects

(1) Once a tollway project is authorized, the Department may enter into an agreement with a local or regional government or private entity to design, build, operate, maintain or administer a tollway project. Arrangements include those specified in ORS Chapter 383.

(2) Before entering into such an agreement, the designated government agency or private entity must demonstrate the financial and legal capacity to meet its responsibilities for financing, operating, maintaining or administering tollway projects.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0070

Use of Public Funds, Risk to the State and Rate-of-Return

(1) In general, public funds should be considered for use in tollway projects only when a project will provide significant, beneficial effects beyond the immediate users of the facility, such as environmental benefits, significant improvements in the performance of other portions of the state roadway network, or demonstration value. In determining how to most appropriately use public resources, the Department may:

(a) Use public money in a manner consistent with the use of such moneys in non-tollway projects;

(b) Use public funds to underwrite studies and other costs associated with public planning processes such as for environmental studies;

(c) Contribute moneys dedicated to special facilities, such as structures of a tollway project that serve non-economic, but socially-desirable goals (e.g., facilities for handicapped vehicles and interchange modifications that improve performance of another roadway); and

(d) Consider the provision of further revenue guarantees.

(2) Financial risk to the state is affected by:

(a) Amount of equity the State commits to the project;

(b) Degree of leverage (debt-finance) of the project, generally, and the use of publicly-issued bonds to finance the facility, specifically;

(c) Degree to which the state highway system is dependent on the project; and

(d) Other factors, including:

(A) Level of liability-creating events assumed by the state during construction and operation;

(B) Accuracy of traffic demand forecasts, cost studies, and other analyses; and

(C) Financial stability of the private partner in the facility.

(3) To reduce financial risk to the state, the Department may consider the following procedures:

(a) Obtain independent investment banking analysis of the transaction and contract terms;

(b) Acquire appropriate guarantees, perfected security interests, and other protections from the actions of partners;

(c) Obtain ownership and/or control interests in the facility as necessary to balance the assumption of liability with the ability to control that liability; and

(d) If assuming liability, exert control over that liability by participating on boards or committees of the entity building and/or operating the facility.

(4) The state shall negotiate a reasonable maximum rate of return on private investment (ROI) with any private entity participating in building, operating or maintaining a tollway, based on the following considerations:

(a) The ROI should be equivalent to the rate of return available on alternative investments of like risk, duration, and tax treatment in the private marketplace; and

(b) The ROI should be properly computed recognizing the financial structure of the total financing, including:

(A) The type of debt used;

(B) The value of the State's contribution to equity (e.g. rights-of-way);

(C) The role of implicit or explicit financial guarantees and contingencies; and

(D) The structure of ownership and control over the facility's life.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

731-040-0080

Public Notice/Involvement Requirements

(1) The Department or local or regional decision-making bodies shall provide opportunities for public notice and involvement in accordance with existing requirements for the STIP or similar local or regional transportation planning processes.

(2) In conducting public outreach efforts, agency personnel shall specify that tolls will be collected to finance the project and make efforts to inform and involve those most affected by tolling.

Stat. Auth.: ORS 184.616, ORS 184.619 & ORS 383.015

Stats. Implemented: ORS 383

Hist.: DOT 3-1997, f. & cert. ef. 12-29-97

