

Oregon State Agency
Agreement to Mediate
Version A – Updated June 2016

The following template was prepared by the Department of Justice for use by its client state agencies. This “Version A” is intended for use in mediations in which an Oregon state agency is a party, at least one non-public body entity is also a party to the mediation and an independent third-party is the mediator. It assumes that the parties are seeking the maximum confidentiality available and that all state agencies who are parties to this mediation have adopted mediation confidentiality rules as required by ORS 36.224.

This form is intended to be accompanied by two addenda. Addenda #1 summarizes the exceptions to mediation confidentiality and Addenda #2 is a copy of the relevant agency mediation confidentiality rule. State agency parties should see their DOJ contact counsel regarding the adaptation of this form to a specific mediation. Additional information related to state agency mediation confidentiality can be found at <http://www.doj.state.or.us/adr/pages/index.aspx>.

This agreement is between the undersigned Parties, the Mediator and any other mediation participants.

1. Subject of Mediation:

[Describe here the dispute, case name or subject of the mediation]

2. Definitions.

- a. The terms “Mediation”, “Mediation Agreement”, “Mediation Communication”, “Mediator”, “Public Body”, “State Agency” and “Parties” have the same meaning as provided in ORS 36.110 and ORS 36.234.
- b. “Mediation” means a process in which a mediator assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator and any party or agent of a party, until such time as a resolution is agreed to by the parties or the Mediation process is terminated. ORS 36.110(5).
- c. The term “Agreement to Mediate” refers to this agreement.
- d. The term “Non-Party Participant” refers to a person, other than the Mediator, a Party or the Party’s representative, who is participating in the Mediation process.
- e. “Mediation Session” refers to meetings conducted in conjunction with a Mediation in which at least one party and the mediator are present.

3. Parties to the Mediation:

- a. Are participating in this process voluntarily;
- b. May withdraw from or suspend the Mediation at any time for any reason (See Paragraph 8 below);
- c. Agree to work cooperatively, to listen to the concerns and suggestions of the other parties and to communicate honestly for the purpose of achieving a mutually satisfactory resolution of this matter;
- d. Come to the mediation with authority to fully resolve all issues; and
- e. Understand that representatives of Public Bodies may not have authority to bind that Public Body to a particular agreement as a matter of law.

4. The Mediator:

- a. Will act as an impartial intermediary and will not act as an advocate for any Party;
- b. Is not acting as a judge and has no authority to force a settlement on the parties;
- c. Will propose a settlement only with the consent of the parties;
- d. May withdraw from the mediation upon notice to the parties consistent with the terms of this agreement and any contractual obligation;
- e. Is not an employee or agent of any Party; and

- f. Will not give legal advice, nor will he or she provide legal counsel to the parties.
- g. Shall be compensated as follows: *[Check one of the following.]*
 - ___ The mediator's fees will be shared equally by the parties.
 - ___ The mediator's fees will be paid by the agency.
 - ___ The Mediator's fees will be paid pursuant to separate agreements between the Mediator and each Party.
 - ___ Other: _____
- 5. Legal Advice: Each party should consult with his or her own legal counsel regarding the potential risks and benefits of participating in mediation. The parties are encouraged to secure independent legal advice throughout the Mediation process and should obtain independent legal review before signing any Mediation Agreement.
- 6. Applicable Law: All applicable Oregon statutes and rules govern this agreement, the mediation process and any agreement resulting from the Mediation ("Mediation Agreement".)
- 7. Discoverability, Admissibility and Confidentiality of Mediation Communications.
 - a. The parties will not subpoena the mediator or otherwise require the mediator to produce records, notes or work product or to testify in any future proceedings as to information disclosed or representations made in the course of the mediation, except to the extent such information is not confidential or may be disclosed pursuant to ORS 36.220, 36.222 or OAR [agency confidentiality rule adopted pursuant to ORS 36.224].
 - b. With respect to matters in litigation, and as provided in the Oregon Evidence Code Rule 408 (ORS 40.190) evidence of an offer to compromise a claim is not receivable into evidence as an admission of either the validity or the invalidity of the claim. Additionally, evidence of conduct or any statement made in compromise negotiations, as well as the offer or completed compromise itself, is not admissible.
 - c. Disclosure to the Mediator of information covered by the attorney-client privilege does not waive the privilege.
 - d. A stenographic or tape record may not be made of any Mediation Session.
 - e. The Mediation Communications in this Mediation are confidential, nondiscoverable and inadmissible to the extent authorized by ORS 36.110 through 36.238 and OAR [agency confidentiality rule adopted pursuant to ORS 36.224] and:
 - i. May not be disclosed to any other person.
 - ii. Will not be admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of, a subsequent administrative, judicial or arbitration proceeding, or introduced as evidence by the parties or the mediator in any subsequent administrative, judicial or arbitration proceeding.
 - f. Exceptions to Confidentiality. The Mediation Communications in this Mediation are not confidential to the extent that an exception to confidentiality listed in ORS 36.110 through 36.238 or OAR [agency confidentiality rule adopted pursuant to ORS 36.224] applies to the communication. See attached Addenda #1 for a summary of those exceptions.
- 8. Termination of Mediation. The matter will be considered resolved and the Mediation concluded only:
 - a. When a written Mediation Agreement is fully executed. (Verbal agreements, draft agreements or an agreement that is not fully executed are not considered a Mediation Agreement or a resolution of the matter); or,
 - b. If no Mediation Agreement is executed, the Mediation will terminate when:
 - i. A party notifies the Mediator, in writing, with a copy to the other parties, that they are ending their participating in the Mediation; or
 - ii. The Mediator notifies the parties that the Mediator is withdrawing from the Mediation: or
 - iii. When one or more of the parties' leaves the process, and at least two parties remain, the Mediation will terminate when an agreement is fully executed or the remaining parties or the mediator withdraws from the mediation.

9. The Mediation Agreement, if any, shall be enforceable as a contract unless the agreement provides otherwise or the agreement resolves a contested case or other matter as to which the agency has authority to issue an order. The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under ORS 17.095 or state or federal law requires the terms to be confidential.
10. Non-Party Participants in mediation are bound by the confidentiality provisions of this agreement and ORS 36.110 through ORS 36.228. Non-Party Participants must sign this Agreement to Mediate as an acknowledgement of their obligation to maintain the confidentiality of this process.
11. Survival of Provisions: Notwithstanding the termination of this mediation the terms of this Agreement to Mediate shall remain valid and enforceable.
12. Counterparts. This agreement may be executed in counterparts and shall have the same effect as one original.

The undersigned agree to the terms and conditions set forth above.

Mediator	Name of Mediator Organization, if any _____	
	Name of Mediator _____	
	Signature of Mediator _____	Date _____
State Agency (Party 1)	Name of Agency (Party 1) _____	
	Name of Agency Representative and Title _____	
	Signature _____	Date _____
Party 2	Name of Party 2 _____	
	Name & Title of Party 2 Representative _____	
	Signature _____	Date _____
Party 3	Name of Party 3 _____	
	Name & Title of Party 3 Representative _____	
	Signature _____	Date _____
Non-Party Participant (If any)	Name of Non-Party Participant _____	
	Non-Party Participant Title or Role _____	
	Signature _____	Date _____

Addenda #1 to the Agreement to Mediate Exceptions to Mediation Confidentiality

The following list is a summary of the exceptions to the confidentiality of mediation communications in this mediation. For the complete text of all applicable exceptions refer to ORS 36.110 through 36.238 and related agency mediation confidentiality rules. (Emphasis added.)

1. The following exceptions are found in ORS 36.220:
 - a. The **parties to a mediation may agree** in writing that all or part of the mediation communications are not confidential.
 - b. Materials, otherwise subject to discovery, that were **not prepared specifically for use in a mediation**, are not confidential.
 - c. Any document that, before its use in a mediation, was a public record as defined in ORS 192.410 remains subject to disclosure.
 - d. Any mediation communication relating to **child abuse** that is made to a person who is required to report child abuse.
 - e. Any mediation communication relating to **elder abuse** that is made to a person who is required to report elder abuse.
 - f. 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 substantial bodily injury to a specific person.
 - g. A party to a mediation may disclose confidential mediation communications to a person if the party's communication with that person is **privileged under ORS 40.010 to 40.585** or other provision of law. A party may disclose confidential mediation communications to any other person for the purpose of **obtaining advice** concerning the subject matter of the mediation, if all parties to the mediation so agree.
2. The following exceptions are found in ORS 36.222. Disclosure permitted in subsequent adjudicatory proceeding:
 - a. A party may disclose confidential mediation communications or agreements in any subsequent adjudicative **proceeding if all parties to the mediation agree** in writing to the disclosure.
 - b. A mediator may disclose confidential mediation communications or confidential mediation agreements in a subsequent adjudicatory proceeding **if all parties to the mediation, the mediator, and the mediation program, if any, agree** in writing to the disclosure.
 - c. 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. In an action for damages or other relief between a party to a mediation and a mediator or mediation program, confidential mediation communications or confidential mediation agreements may be disclosed 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.
3. The following exception is found in ORS 36.230: **Mediation Agreements are not confidential if a public body is a party** to the mediation or if the mediation is one in which a state agency is mediating a dispute as to which the state agency has regulatory authority.
4. The following exception is summarized from ORS 36.232: Disclosures of Mediation Communications are allowed **for reporting, research, training and educational purposes**.
5. The following exceptions are summarized from Model Rule OAR 137-005-0052 and are applicable to agencies that have adopted that rule. See Addenda #2 for a copy of the rule, and rule-related exceptions, applicable to this mediation
 - a. A mediation communication may be disclosed to the extent the communication is necessary to **prevent the commission of a crime** that is likely to result in death or bodily injury to any person.
 - b. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may **further the investigation or prosecution of a felony crime** involving physical violence to a person.
 - c. Any mediation communication **related to the conduct of a licensed professional** that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such

communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

- d. 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**.
- e. A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding **at the discretion of the party who prepared the communication** so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.
- f. To the extent a mediation communication contains information the substance of which is **required to be disclosed by Oregon statute**, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.
- g. Written mediation **communications prepared by or for the agency or its attorney** are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:
 - i. Attorney client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege, or
 - ii. Attorney work product prepared in anticipation of litigation or for trial, or
 - iii. Prepared exclusively for the mediator or in a caucus session and not given to another party in
 - iv. the mediation other than a state agency, or
 - v. Prepared in response to the written request of the mediator for specific documents or
 - vi. information and given to another party in the mediation, or
 - vii. Settlement concepts or proposals, shared with the mediator or other parties.
- h. A mediation communication made to the agency may be disclosed and may be admitted into evidence **to the extent the agency director, administrator or board 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.

**Addenda #2 to the Agreement to Mediate
Agency Rules Adopted Pursuant to ORS 36.224**

*[Include here a copy of the applicable
agency rule adopted pursuant to ORS 36.224.]*

*For additional information regarding state agency mediation confidentiality rules see
<http://www.doj.state.or.us/adr/pages/adr32.aspx>]*

Optional Clauses

The following optional clauses cover a range of topics, such as mediation scheduling, submissions to the mediator, mediator liability, the role of lawyers, media contacts and other provisions that may be allocable in some mediations. State agency parties should see their DOJ contact counsel regarding the applicability of these optional clauses to a particular mediation.

1. Optional Definitions from ORS chapter 36 [*Comment: The agreement to mediate cites the ORS where these definitions can be found. For greater clarity you may wish to include the actual text.*]:

- a. "Mediation agreement" means an agreement arising out of a mediation, including any term or condition of the agreement. ORS 36.110(6).
- b. "Mediation communications" means:
 - i. All communications that are made, in the course of or in connection with a mediation, to a mediator, a mediation program or a party to, or any other person present at, the mediation proceedings; and
 - ii. All memoranda, work products, documents and other materials, including any draft mediation agreement, that are prepared for or submitted in the course of or in connection with a mediation or by a mediator, a mediation program or a party to, or any other person present at, mediation proceedings. ORS 36.110(7).
- c. "Mediation program" means a program through which mediation is made available and includes the director, agents and employees of the program. ORS 36.110(8).
- d. "Mediator" means a third party who performs mediation. "Mediator" includes agents and employees of the mediator or mediation program and any judge conducting a case settlement conference. ORS 36.110(9).
- e. "Public body" has the meaning given that term in ORS 174.109. ORS 36.110(10).
- f. "State agency" means any state officer, board, commission, bureau, department, or division thereof, in the executive branch of state government. ORS 36.110(11).
- g. Parties to mediation. For the purposes of ORS 36.220 to 36.238, a person, state agency or other public body is a party to a mediation if the person or public body participates in a mediation and has a direct interest in the controversy that is the subject of the mediation. A person or public body is not a party to a mediation solely because the person or public body is conducting the mediation, is making the mediation available or is serving as an information resource at the mediation. ORS 36.234.

2. Optional Confidentiality-Related Clauses

- a. Because the parties are disclosing sensitive information in reliance upon an agreement of confidentiality, any breach of this agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party may obtain an injunction to prevent disclosure of any such confidential information in violation of this agreement.
- b. In the event any party causes the mediator to be served with a subpoena or other process in violation of this clause, such party shall pay the mediator's reasonable costs, expenses and fees, including attorney's fees, related to the violation.
- c. The parties agree that Mediation Communications may be disclosed to


[List here the names of the persons to whom Mediation Communications may be disclosed]

to the extent necessary to get advice concerning the subject matter of the mediation. (Before any disclosure takes place the person who will receive any confidential Mediation Communication must sign this agreement.)

- d. Media: During the mediation, none of the parties or their representatives will discuss any matter relating to the mediation with any representatives of the media except with the express written permission of all the parties to the mediation process.

3. Optional Logistical/Scheduling Clauses

- a. Date and Time: The mediation will take place at _____, on the ____ day of _____ at _____ o'clock __M. It is anticipated that the mediation will last for ____ hours and if resolution is not achieved within this time frame, subsequent mediations may be scheduled with the agreement of all parties.
- b. Deadline: The parties have established a deadline for the conclusion of the mediation. The deadline is _____. On/at this date/time, the mediation will terminate unless the parties agree otherwise in writing.

4. Optional "Other Participant" related Clauses:

- a. Legal counsel may participate fully as an advocate for their clients during the mediation, bearing in mind that it may be appropriate in mediation for the parties to speak directly to each other or to the mediator.
- b. Witnesses: With respect to the role of witnesses in the mediation: ____ [describe extent to which witnesses may be called and whether they may be present during mediation session or join in the discussion] ____. Subject to these terms, the following witnesses may testify: ____ [Name] _____.

5. Submissions to the Mediator [2 versions]:

- a. Parties may submit pleadings, backup documents and explanations of the party's point of view to the Mediator. Submissions must be received by the mediator at least ____ business days before the first scheduled Mediation Session. Submissions will be confidential to the extent provided in this agreement and Oregon law.
- b. Parties agree to submit to the mediator a confidential case summary to aid the mediator in preparing for the Mediation. The case summary must be submitted by ____ [date] ____ and should include a brief summary of:
 - i. The procedural status of the case;
 - ii. Key factual and legal issues and strengths and weakness of each
 - iii. Detailed "damages" analysis, if applicable;
 - iv. Non-monetary needs or objectives of all parties;
 - v. History of previous settlement attempts and reasons why you believe they weren't successful;
 - vi. Current barriers to a settlement or agreement in this matter;
 - vii. Copies of key documents; and
 - viii. Any other information that might aid the Mediator.

6. Optional Mediator-Related Clauses:

- a. Mediator Liability: The mediator is not civilly liable for any act or omission done or made while engaged in efforts to assist or facilitate a mediation, unless that act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.
- b. Mediator Standards: The mediator is bound by the following ethical or professional standards or guidelines (*Check all that apply*):
 - i. ____ Oregon State Bar ORPC Rule 2.4 at <http://www.osbar.org/docs/rulesregs/orpc.pdf>.
 - ii. ____ Oregon Mediation Association Standards of Mediation Practice at <http://www.omediate.org/pg61.cfm>.
 - iii. ____ Other: _____

7. Contested Case: *[This provision may be used when the mediation concerns a matter in which a contested case hearing has been timely requested and mediation has been agreed to by the agency.]*
- a. This mediation involves issues relating to a proposed agency action.
 - b. [Entity name] (hereinafter “party to the contested case”) has requested a contested case hearing on the proposed agency action.
 - c. The agency will stay the contested case proceeding until a Mediation Agreement is reached, the agency or the party to the contested case discontinues the mediation, or the deadline of [deadline (date)] has passed.
 - d. Unless the deadline (if any) for the conclusion of the Mediation is extended by the agency and the party to the contested case, the Mediation will terminate on the date specified in this agreement, above, and the agency will schedule a contested case hearing.
 - e. Failing to reach a Mediation Agreement will not, in and of itself, affect the party’s right to a contested case hearing.
 - f. If the party to the contested case and the agency sign a Mediation Agreement resolving the issues related to the proposed agency action, the party to the contested case waives any right to a contested case hearing or further appeal; unless the Mediation Agreement specifies that there are issues that remain unresolved.