

# Policy Concept Form

All policy proposals including new policy concepts, recommendations to revise, or requests to repeal must be submitted via this form to the University Secretary. The Secretary will forward completed concept forms to the President's Policy Advisory Council for consideration pursuant to I.03.01 Policy on University Policies. When submitting a policy concept form, please keep the following university definition of "policy" in mind:

*A University Policy ("Policy") is a policy that (1) has broad application or impact throughout the University community, (2) must be implemented to ensure compliance with state or federal law, (3) is necessary to enhance the University's mission, to ensure institutional consistency and operational efficiency, or to mitigate institutional risks; or (4) is otherwise designated by the Board or the President as a University Policy subject to the Policy- Making Process authorized in section 4. A policy establishes rights, requirements or responsibilities. Excluded from this definition are things such as, but not limited to, implementation guides, operating guidelines, internal procedures, and similar management controls and tools.*

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**Policy Subject Matter** (please included existing policy number(s) if available)

Former OAR 580.01.0030 - Confidentiality and Inadmissability of Mediation Communications.

**Statement of Need and Desired Result** (please describe what we accomplish with the proposed action)

This policy should be repealed; not applicable post-governance. Language in this policy was adopted by OUS and follows the AG's model language for state agencies. The UO is not a state agency; however, UO is still governed by applicable statutes, including those cited in the OAR (see ORS Chs 36, 40, 192). Thus, parties and records are still protected even w/o OAR needed by OUS. Recommendation stemmed from OGC. HR agrees. The Office of Community Dispute Resolution reviewed to ensure repeal doesn't impact its operations.

**Affected Policy Stakeholders** (please list all known impacted stakeholders and the nature of those impacts)

None; protections and statutes related to this issue are in tact and the UO must follow those. This repeals a policy of OUS that is not needed by UO.

**Proposed Action** (i.e., new, revision, repeal)

Repeal

### **Reason for Policy**

This policy outlines the confidentiality pertaining to certain communications generated during or relating to mediation involving the University, to which the University is a party, or for which the University acts as a mediator.

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### **Entities Affected by this Policy**

Those interested in obtaining mediation records; all those involved with mediation or maintaining or working with mediation related communications.

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### **Web Site Address for this Policy**

<http://policies.uoregon.edu/confidentiality-and-inadmissibility-mediation-communications>

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### **Responsible Office**

For questions about this policy, please contact the Public Records Office at 541-346-6823 or General Counsel at 541-346-3043.

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### **Enactment & Revision History**

Technical revisions enacted by the University Secretary on September 4, 2015.

Became a University of Oregon Policy by operation of law on July 1, 2014.

Former Oregon Administrative Rule Chapter 580 Division 1 Section 30.

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### **Policy**

#### **Confidentiality and Inadmissibility of Mediation Communications**

(1) The words and phrases used in this rule have the same meaning as given to them in ORS 36.110 and 36.234.

(2) Nothing in this policy affects any confidentiality created by other law. Nothing in this rule relieves a public body from complying with the Public Meetings Law, ORS 192.610 to 192.690. Whether or not they are confidential under this or other policies of the University, mediation

communications are exempt from the disclosure under the Public Records Law to the extent provided in 192.410 to 192.505.

(3) This policy applies only to mediations in which the University is a party or is mediating a dispute as to which the University has regulatory authority. This policy does not apply when the agency is acting as the "mediator" in a matter in which the agency also is a party as defined in ORS 36.234.

(4) To the extent mediation communications would otherwise compromise negotiations under ORS 40.190 (OEC Rule 408), those mediation communications are not admissible as provided in 40.190 (OEC Rule 408), notwithstanding any provisions to the contrary in section (9) of this policy.

(5) Mediations Excluded. Sections (6)-(10) of this policy do not apply to:

(a) Mediation of workplace interpersonal disputes involving the interpersonal relationships between the University's employees, officials or employees and officials, unless a formal grievance under a labor contract, a tort claim notice or a lawsuit has been filed; or

(b) Mediation in which the person acting as the mediator will also act as the hearings officer in a contested case involving some or all of the same matters;

(c) Mediation in which the only parties are public bodies;

(d) Mediation involving two or more public bodies and a private party if the laws, rule or policies governing mediation confidentiality for at least one of the public bodies provide that mediation communications in the mediation are not confidential;

(e) Mediation involving 15 or more parties if the University has designated that another mediation confidentiality rule adopted by the University may apply to that mediation.

(6) Disclosures by Mediator. A mediator may not disclose or be compelled to disclose mediation communications in a mediation and, if disclosed, such communications may not be introduced into evidence in any subsequent administrative, judicial or arbitration proceeding unless:

(a) All parties to the mediation and the mediator agree in writing to the disclosure; or

(b) The mediation communication may be disclosed or introduced into evidence in a subsequent proceeding as provided in subsections (c) – (d), (j) – (l) or (o) – (p) of Section (9) of this policy.

(7) Confidentiality and Inadmissibility of Mediation Communications. Except as provided in Sections (8) – (9) of this policy, mediation communications are confidential and may not be

disclosed to any other person, are not admissible in any subsequent administrative, judicial or arbitration proceeding and may not be disclosed during testimony in, or during any discovery conducted as part of a subsequent proceeding, or introduced as evidence by the parties or the mediator in any subsequent proceeding.

(8) Written Agreement. Section (7) of this policy does not apply to a mediation unless the parties to the mediation agree in writing, as provided in this section, that the mediation communications in the mediation will be confidential and/or nondiscoverable and inadmissible. If the mediator is the employee of and acting on behalf of a state agency, the mediator or an unauthorized agency representative must also sign the agreement. The parties' agreement to participate in a confidential mediation must be in substantially the following form. This form may be used separately or incorporated into an "agreement to mediate." [Form not included. See ED. NOTE.]

(9) Exceptions to confidentiality and inadmissibility.

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

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

(c) A mediation communication is not confidential and may be disclosed by any person receiving the communication to the extent that person reasonably believes that disclosing the communication is necessary to prevent the commission of a crime that is likely to result in death or bodily injury to any person. A mediation communication is not confidential and may be disclosed in a subsequent proceeding to the extent its disclosure may further the investigation or prosecution of a felony crime involving physical violence to a person.

(d) Any mediation communication related to the conduct of a licensed professional that is made to or in the presence of a person who, as a condition of his or her professional license, is obligated to report such communication by law or court rule is not confidential and may be disclosed to the extent necessary to make such a report.

(e) The parties to the mediation may agree in writing that all or part of the mediation communications are not confidential or that all or part of the mediation communications may be disclosed and may be introduced into evidence in a subsequent proceeding unless the substance of the communication is confidential, privileged or otherwise prohibited from disclosure under state or federal law.

(f) A party to the mediation may disclose confidential mediation communications to a person if the party's communication with that person is privileged under ORS chapter 40 or other provision of law. A party to the mediation may disclose confidential mediation communications to a person for the purpose of obtaining advice concerning the subject matter of the mediation, if all the parties agree.

(g) An employee of the University may disclose confidential mediation communications to another University employee so long as the disclosure is necessary to conduct authorized activities of the University. An employee receiving a confidential mediation communication under this subsection is bound by the same confidentiality requirements as apply to the parties to the mediation.

(h) A written mediation communication may be disclosed or introduced as evidence in a subsequent proceeding at the discretion of the party who prepared the communication so long as the communication is not otherwise confidential under state or federal law and does not contain confidential information from the mediator or another party who does not agree to the disclosure.

(i) In any proceeding to enforce, modify or set aside a mediation agreement, a party to the mediation may disclose mediation communications and such communications may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of mediation communications or agreements to persons other than the parties to the agreement.

(j) In an action for damages or other relief between a party to the mediation and a mediator or mediation program, mediation communications are not confidential and may be disclosed and may be introduced as evidence to the extent necessary to prosecute or defend the matter. At the request of a party, the court may seal any part of the record of the proceeding to prevent further disclosure of the mediation communications or agreements.

(k) When a mediation is conducted as part of the negotiation of a collective bargaining agreement, the following mediation communications are not confidential and such communications may be introduced into evidence in a subsequent administrative, judicial or arbitration proceeding:

(A) A request for mediation; or

(B) A communication from the Employment Relations Board Conciliation Service establishing the time and place of the mediation; or

(C) A final offer submitted by the parties to the mediator pursuant to ORS 243.712; or

(D) A strike notice submitted to the Employment Relations Board.

(I) To the extent a mediation communication contains information on the substance of which is required to be disclosed by Oregon statute, other than ORS 192.410 to 192.505, that portion of the communication may be disclosed as required by statute.

(m) Written mediation communications prepared by or for the University or its attorney are not confidential and may be disclosed and may be introduced as evidence in any subsequent administrative, judicial or arbitration proceeding to the extent the communication does not contain confidential information from the mediator or another party, except for those written mediation communications that are:

(A) Attorney-client privileged communications so long as they have been disclosed to no one other than the mediator in the course of the mediation or to persons as to whom disclosure of the communication would not waive the privilege; or

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

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

(D) Prepared in response to the written request of the mediator for specific documents or information and given to another party in the mediation; or

(E) Settlement concepts or proposals, shared with the mediator or other parties.

(n) A mediation communication made to the University may be disclosed and may be admitted into evidence to the extent the University President or his/her designee determines that disclosure of the communication is necessary to prevent or mitigate a serious danger to the public's health or safety, and the communication is not otherwise confidential or privileged under state or federal law.

(o) The terms of any mediation agreement are not confidential and may be introduced as evidence in a subsequent proceeding, except to the extent the terms of the agreement are exempt from disclosure under ORS 192.410 to 192.505, a court has ordered the terms to be confidential under 30.402 or state or federal law requires the terms to be confidential.

(p) The mediator may report the disposition of a mediation to the University at the conclusion of the mediation so long as the report does not disclose specific confidential mediation communications. The University or the mediator may use or disclose confidential mediation communications for research, training or educational purposes, subject to the provisions of ORS 36.232(4).

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

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**Related Resources**

N/A