

## 65 Federal Register 83085 (December 29, 2000)

### FEDERAL ALTERNATIVE DISPUTE RESOLUTION COUNCIL

#### Confidentiality in Federal Alternative Dispute Resolution Programs

AGENCY: Federal Alternative Dispute Resolution Council/Department of Justice

ACTION: Guidance.

**SUMMARY:** This notice publishes a document entitled “Confidentiality in Federal Alternative Dispute Resolution Programs,” which provides guidance to assist Federal agencies in developing ADR programs. The document was created by a subcommittee of the Federal ADR Steering Committee, a group of subject matter experts from federal agencies with ADR programs. It was approved by the Federal ADR Council, a group of high-level government officials chaired by the Attorney General. The document contains detailed guidance on the nature and limits of confidentiality in Federal ADR programs and also includes guidelines for a statement on these issues that Federal neutrals may use in ADR proceedings.

Interested persons have been afforded an opportunity to participate in the making of this guidance. A draft was submitted for public comment in the Federal Register, and due consideration has been given to the comments received. Comments were provided by private sector organizations and government agencies from around the country.

**ADDRESS:** Address any comments to Jeffrey M. Senger, Deputy Senior Counsel for Dispute Resolution, United States Department of Justice, 950 Pennsylvania Ave. NW, Room 4328, Washington, D.C., 20530

Dated: December 19, 2000

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Jeffrey M. Senger  
Deputy Senior Counsel for Dispute Resolution  
United States Department of Justice

#### SUPPLEMENTARY INFORMATION:

##### **Authority.**

The Administrative Dispute Resolution Act of 1996 (ADR Act), 5 U.S.C. §§ 571-584, requires each Federal agency to promote the use of ADR and calls for the establishment of an interagency committee to assist agencies in the use of ADR. Pursuant to this Act, a Presidential Memorandum dated May 1, 1998, created the Interagency ADR Working Group, chaired by the

Attorney General, to “facilitate, encourage, and provide coordination” for Federal agencies. In the Memorandum, the President charged the Working Group with assisting agencies with training in “how to use alternative means of dispute resolution.” The following document is designed to serve this goal.

## **Introduction.**

The subject of the document is confidentiality, which is a critical component of a successful ADR process. Guarantees of confidentiality allow parties to freely engage in candid, informal discussions of their interests in order to reach the best possible settlement of their claims. A promise of confidentiality allows parties to speak openly without fear that statements made during an ADR process will be used against them later. Confidentiality can reduce posturing and destructive dialogue among parties during the settlement process.

Public comment was solicited on a draft of this document that was published in the Federal Register at 65 FR 59200, October 4, 2000. The draft was revised to incorporate many suggestions on the draft received from the following private sector organizations, government agencies, and individuals from around the country:

American Bar Association, Section of Administrative Law and Regulatory Practice  
American Bar Association, Section of Dispute Resolution  
Association of the Bar of the City of New York, Committee on Alternative Dispute Resolution  
Executive Council on Integrity and Efficiency  
Federal Mediation and Conciliation Service  
Martin J. Harty  
Lawrence A. Huerta  
Oregon Department of Agriculture Farm Mediation Program  
Margaret Porter, Administrator, Federal Sharing Neutrals Program  
Karen D. Powell  
President’s Council on Integrity and Efficiency  
Texas Center for Public Policy Dispute Resolution  
United States Department of Agriculture, Office of Inspector General  
United States Department of Energy, Chicago Operations Office  
United States Department of Transportation, Federal Aviation Administration  
United States Institute for Environmental Conflict Resolution  
Richard C. Walters

Major comments fell primarily into three categories. The first is the interplay of the ADR Act confidentiality provisions with federal “access” statutes that provide Federal entities authority to seek access to certain classes of information. The second is the extent of confidentiality protection for statements of parties made in joint session. The third is the model statement on confidentiality for neutrals to read to parties at the beginning of a mediation.

The ADR Council believes that the understanding of these issues will benefit from experience and further collaboration with a broader community. The Council recognizes that its timetable for comments to this document was limited and wants to make clear that it anticipates further discussion of these issues. Future research, analysis, and practical experience in the field are certain to have a continuing impact on these important areas, and this Guidance may need to be revised or updated. We look forward to cooperation with interested parties in this work.

### **The Relationship Between the ADR Act and Other Authorities.**

The largest number of comments concerned the relationship between ADR Act confidentiality guarantees and other laws or regulations that authorize access to certain classes of information. Some commenters suggested that confidentiality should be narrower than provided under the draft Guidance. For example, some commenters believed that threats of physical harm and statements concerning ongoing or future criminal activity should not be confidential. Other commenters stated that Federal statutes providing access for government investigatory agencies should override the ADR Act's confidentiality guarantees.

In sharp contrast, other commenters believed that the confidentiality guarantees in the draft should be much broader. Several commenters argued that the ADR Act prohibitions on disclosure take precedence over any other Federal statute. These commenters argue that the ADR Act allows Inspectors General and other investigators to obtain confidential communications only through a court order obtained pursuant to the Act.

The Federal ADR Council acknowledges the points of view expressed in these comments but does not concur with them. There does not appear to be an easy answer to the tension between these authorities. While the ADR Act's confidentiality provisions are clear, the access provisions of other statutes are equally clear.

Standard techniques for resolving statutory conflicts do not provide a ready answer in this situation. For example, arguments have been made on both sides as to which statute is more specific. While the ADR Act specifically addresses the types of processes to which it applies, some have argued that other acts, such as the Inspector General Act, do the same by specifically describing the types of information that may be requested and the purposes for which a request can be made. Nor does the legislative history of the ADR Act provide an apparent solution, as it does not appear to contain any mention of this conflict.

A further problem is that the Federal ADR Council is not the appropriate body to provide a final decision on this question. The Council is an advisory body created by the Attorney General to issue guidance, but it is not authorized to promulgate binding interpretations in the manner of a court.

While it is, of course, appropriate to give this matter careful attention, we note that the circumstances when confidentiality might be challenged are, based on our experience, rare. The Council believes that there are opportunities for ADR programs and Federal requesting entities to establish good working relationships such that disputes over demands for disclosure of

confidential communications can be minimized. This report continues to endorse a cooperative approach of this nature.

In addition, the revised report endorses use of the standards in the ADR Act's judicial override provision, sections 574(a)(4) and (b)(5), stating that they should be used both formally, when available, and informally to resolve the rare instances where requesting entities seek access to communications protected by the ADR Act.

### **The Confidentiality of Statements Made in Joint Session.**

Many comments were also received concerning the extent of confidentiality protection for statements made by parties in joint session. The draft report stated that there is no confidentiality protection for a party's dispute resolution communications that are available to all other parties, such as comments made or documents shared in joint session. Commenters noted that the guidance on this issue differs from traditional ADR practices and party expectations regarding confidentiality, and said this interpretation could reduce the utility of joint sessions. One commenter suggested that the report's interpretation of section 574(b)(7), the key provision on this point, would render sections 574(b)(1)-(6) superfluous. Further, this commenter noted that comments by several legislators and a Senate report indicate 574(b)(7) was intended to cover only documents, not oral statements.

The Federal ADR Council acknowledges that the ADR Act's treatment of this issue is different from the practice in many ADR processes that do not involve the government, but notes that the language of the statute is difficult to overcome. The Act states that there is no confidentiality protection if "the dispute resolution communication was provided to or was available to all parties in the dispute resolution proceeding." 5 U.S.C. 574(b)(7). Communications in a joint session with all parties present fit squarely within this provision. Further, the Act's definition of dispute resolution communication contains no exception for oral statements. Indeed, it explicitly includes "any oral or written communication prepared for the purposes of a dispute resolution proceeding" (emphasis added).

Despite the language of (b)(7), it appears that the remaining provisions of 574(b) provide protection for limited types of communications. These other sections continue to protect, for example, a party who is asked what a mediator said at any time, or a party who is asked what another party said in a multi-party case when not all parties were present. With regard to legislative history, an indicator of Congressional intent is the report of the final Conference Committee in 1996, when the current statute was enacted. It states, "A dispute resolution communication originating from a party to a party or parties is not protected from disclosure by the ADR Act." H.R. Rep. No. 104-841, 142 Cong. Rec. H11,110 (September 25, 1996). The Committee could have used the word "document" if it wanted to exclude oral statements, but it chose to use the term "dispute resolution communication," which is explicitly defined in the statute to include oral statements.

The Council does recognize that this provision could hinder a party's candor in a joint session, and therefore the Guidance suggests that parties address this issue through the use of a

contract. Confidentiality agreements are a standard practice in many ADR contexts, and their use is encouraged in Federal dispute resolution processes where confidentiality of party-to-party communications is desired. It is important to note that confidentiality agreements do not bind anyone who is not a signatory. Further, such agreements will not protect against disclosure of documents through the Freedom of Information Act (FOIA). Nevertheless, the majority of problems caused by the plain language reading of section 574(b)(7) can be rectified through a well-drafted confidentiality agreement.

### **The Model Confidentiality Statement for Use by Neutrals.**

Finally, many commenters made suggestions regarding the Model Confidentiality Statement for Use by Neutrals that appeared at the end of the draft report. Some commenters argued that provisions should be added to the statement to ensure parties were made aware of additional possible confidentiality exceptions. Others stated that the statement was already too complex and potentially chilling. The Council appreciates the difficulty in making an opening statement complete enough to put parties on notice of important issues, while not making it so exhaustive that it discourages participation in ADR. The Council acknowledges that a well-drafted statement should accommodate all of these concerns as well as possible.

Other commenters noted that the statement may not be appropriate for all types of proceedings or all types of neutrals. The Federal ADR Council agrees that the model statement may not fit all situations and all ADR processes, or even all stages of a single ADR process. In response to these comments, the Guidance now includes a set of guidelines for neutrals to use in developing their own statements on confidentiality, appropriate to the situation. It is the neutral's responsibility to address confidentiality with the parties. Neutrals and agency ADR programs may want to develop a standard confidentiality statement, consistent with the guidelines presented in this report, that is appropriate to a particular ADR process.

The Guidance also includes an example of one possible confidentiality statement. It is important to note that this statement should be tailored, as necessary, to fit the needs of each particular case. This statement refers to a mediation, because mediation is the most common ADR process in the Federal government.

### **Conclusion.**

The balance of this revised report follows the same format as the draft report. Section I is a reprint of the confidentiality provisions of the ADR Act. Section II is a section-by-section analysis of the confidentiality provisions of the Act. Section III contains the revised questions and answers on confidentiality issues likely to arise in practice. Section IV contains the new guidelines for use in developing confidentiality statements. In addition, as assistance for neutrals and agencies drafting confidentiality statements, Section IV contains an example of one possible confidentiality statement.

Nothing in these guidance documents shall be construed to create any right or benefit, substantive or procedural, enforceable at law or in equity, by a party against the United States, its

agencies, its officers or any other person.

The Federal ADR Council

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# **REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996**

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## **I. ADMINISTRATIVE DISPUTE RESOLUTION ACT**

### **Definitions (5 U.S.C. 571)**

For the purposes of this subchapter, the term--

- (1) "agency" has the same meaning as in section 551(1) of this title;
- (2) "administrative program" includes a Federal function which involves protection of the public interest and the determination of rights, privileges, and obligations of private persons through rule making, adjudication, licensing, or investigation, as those terms are used in subchapter II of this chapter;
- (3) "alternative means of dispute resolution" means any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination thereof;
- (4) "award" means any decision by an arbitrator resolving the issues in controversy;
- (5) "dispute resolution communication" means any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral, parties or nonparty participant; except that a written agreement to enter into a dispute resolution proceeding, or final written agreement or arbitral award reached as a result of a dispute resolution proceeding, is not a dispute resolution communication;

- (6) "dispute resolution proceeding" means any process in which an alternative means of dispute resolution is used to resolve an issue in controversy in which a neutral is appointed and specified parties participate;
- (7) "in confidence" means, with respect to information, that the information is provided--  
(A) with the expressed intent of the source that it not be disclosed; or  
(B) under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed;
- (8) "issue in controversy" means an issue which is material to a decision concerning an administrative program of an agency, and with which there is disagreement--  
(A) between an agency and persons who would be substantially affected by the decision; or  
(B) between persons who would be substantially affected by the decision;
- (9) "neutral" means an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy;
- (10) "party" means--  
(A) for a proceeding with named parties, the same as in section 551(3) of this title; and  
(B) for a proceeding without named parties, a person who will be significantly affected by the decision in the proceeding and who participates in the proceeding;
- (11) "person" has the same meaning as in section 551(2) of this title; and
- (12) "roster" means a list of persons qualified to provide services as neutrals.

### **Confidentiality (5 U.S.C. 574)**

- (a) Except as provided in subsections (d) and (e), a neutral in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless--
- (1) all parties to the dispute resolution proceeding and the neutral consent in writing, and, if the dispute resolution communication was provided by a nonparty participant, that participant also consents in writing;
  - (2) the dispute resolution communication has already been made public;
  - (3) the dispute resolution communication is required by statute to be made public, but a neutral should make such communication public only if no other person is reasonably available to disclose the communication; or
  - (4) a court determines that such testimony or disclosure is necessary to--
    - (A) prevent a manifest injustice;
    - (B) help establish a violation of law; or

(C) prevent harm to the public health or safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

(b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless—

- (1) the communication was prepared by the party seeking disclosure;
- (2) all parties to the dispute resolution proceeding consent in writing;
- (3) the dispute resolution communication has already been made public;
- (4) the dispute resolution communication is required by statute to be made public;
- (5) a court determines that such testimony or disclosure is necessary to--
  - (A) prevent a manifest injustice;
  - (B) help establish a violation of law; or
  - (C) prevent harm to the public health and safety, of sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential;
- (6) the dispute resolution communication is relevant to determining the existence or meaning of an agreement or award that resulted from the dispute resolution proceeding or to the enforcement of such an agreement or award; or
- (7) except for dispute resolution communications generated by the neutral, the dispute resolution communication was provided to or was available to all parties to the dispute resolution proceeding.

(c) Any dispute resolution communication that is disclosed in violation of subsection (a) or (b), shall not be admissible in any proceeding relating to the issues in controversy with respect to which the communication was made.

- (d) (1) The parties may agree to alternative confidential procedures for disclosures by a neutral. Upon such agreement the parties shall inform the neutral before the commencement of the dispute resolution proceeding of any modifications to the provisions of subsection (a) that will govern the confidentiality of the dispute resolution proceeding. If the parties do not so inform the neutral, subsection (a) shall apply.
- (2) To qualify for the exemption established under subsection (j), an alternative confidential procedure under this subsection may not provide for less disclosure than the confidential procedures otherwise provided under this section.

(e) If a demand for disclosure, by way of discovery request or other legal process, is made upon a neutral regarding a dispute resolution communication, the neutral shall make reasonable efforts to notify the parties and any affected nonparty participants of the demand. Any party or affected nonparty participant who receives such notice and

within 15 calendar days does not offer to defend a refusal of the neutral to disclose the requested information shall have waived any objection to such disclosure.

(f) Nothing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.

(g) Subsections (a) and (b) shall have no effect on the information and data that are necessary to document an agreement reached or order issued pursuant to a dispute resolution proceeding.

(h) Subsections (a) and (b) shall not prevent the gathering of information for research or educational purposes, in cooperation with other agencies, governmental entities, or dispute resolution programs, so long as the parties and the specific issues in controversy are not identifiable.

(i) Subsections (a) and (b) shall not prevent use of a dispute resolution communication to resolve a dispute between the neutral in a dispute resolution proceeding and a party to or participant in such proceeding, so long as such dispute resolution communication is disclosed only to the extent necessary to resolve such dispute.

(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3).

## **II. SECTION-BY-SECTION ANALYSIS OF CONFIDENTIALITY PROVISIONS (5 U.S.C. 574)**

### **Section 574(a)**

In general, a neutral in a dispute resolution proceeding is prohibited from disclosing any dispute resolution communication or any communication provided to him or her in confidence. Unless the communication falls within one of the exceptions listed below, the neutral cannot voluntarily disclose a communication and cannot be forced to disclose a communication through a discovery request or by any other compulsory process.

The exceptions to this general rule are found in subsections 574(a)(1) - (4), 574(d) and 574(e).

**Section 574(a)(1)**

A neutral may disclose a dispute resolution communication if all parties and the neutral agree in writing to the disclosure. If a nonparty provided the dispute resolution communication, then the nonparty must also agree in writing to the disclosure.

**Section 574(a)(2)**

A neutral may disclose a dispute resolution communication if the communication has already been made public.

**Section 574(a)(3)**

A neutral may disclose a dispute resolution communication if there is a statute which requires it to be made public. However, the neutral should not disclose the communication unless there is no other person available to make the disclosure.

**Section 574(a)(4)**

A neutral may disclose a dispute resolution communication or a communication provided in confidence to the neutral if a court finds that the neutral's testimony, or the disclosure, is necessary to:

- A. prevent a manifest injustice;
- B. help establish a violation of law; or
- C. prevent harm to the public health and safety.

In order to require disclosure, a court must determine that the need for disclosure is of sufficient magnitude to outweigh the detrimental impact on the integrity of dispute resolution proceedings in general. The need for the information must be so great that it outweighs a loss of confidence among other potential parties that their dispute resolution communications or communications provided in confidence to the neutral will remain confidential in future proceedings.

**Section 574(b)**

Unless a dispute resolution communication falls within one of the exceptions listed below, a party cannot voluntarily disclose the communication and cannot be forced to disclose a communication through a discovery request or by any other compulsory process.

**Section 574(b)(1)**

The party who prepared the dispute resolution communication is free to disclose it.

**Section 574(b)(2)**

A party may disclose a dispute resolution communication if all the parties agree in writing to the disclosure.

**Section 574(b)(3)**

A party may disclose a dispute resolution communication if the dispute resolution communication has already been made public.

**Section 574(b)(4)**

A party may disclose a dispute resolution communication if there is a statute which requires it to be made public.

#### **Section 574(b)(5)**

A party may be required to disclose a dispute resolution communication if a court finds that the party's testimony, or the disclosure, is necessary to:

- A. prevent a manifest injustice;
- B. help establish a violation of law; or
- C. prevent harm to the public health and safety.

In order to require disclosure, a court must determine that the need for disclosure is of sufficient magnitude to outweigh the detrimental impact on the integrity of dispute resolution proceedings in general. The need for the information must be so great that it outweighs a loss of confidence among other potential parties that their dispute resolution communications will remain confidential in future proceedings.

#### **Section 574(b)(6)**

- 1) Parties may use dispute resolution communications to show that a settlement agreement was in fact reached or to show what the terms of this agreement mean.
- 2) Parties may also use dispute resolution communications in connection with later issues regarding enforcing the agreement.

#### **Section 574(b)(7)**

- 1) A party is not prohibited from disclosing another party's dispute resolution communication that was available to all parties in the proceeding. For example, in a joint mediation session with all parties present, statements made and documents provided by parties are not confidential.
- 2) Dispute resolution communications coming from the neutral are nonetheless confidential.

#### **Section 574(c)**

No one may use any dispute resolution communication in a related proceeding, if that communication was disclosed in violation of Section 574 (a) or (b).

#### **Section 574(d)(1)**

- 1) Parties may agree to alternative confidentiality procedures for disclosures by a neutral.
- 2) Parties must inform the neutral of the alternative procedures before the dispute resolution proceeding begins.
- 3) If parties do not inform the neutral of the alternative procedures, the procedures outlined in Section 574(a) will apply.

#### **Section 574(d)(2)**

- 1) Dispute resolution communications covered by alternative confidentiality procedures may be protected from disclosure under FOIA.

- 2) To qualify for this protection, the alternative procedures must provide for as much, or more, disclosure than the procedures provided in Section 574.
- 3) Dispute resolution communications covered by alternative confidentiality procedures do not qualify for protection from disclosure under FOIA if the alternative procedures provide for less disclosure than those outlined in Section 574.

#### **Section 574(e)**

- 1) A neutral who receives a demand for disclosure, in the form of a discovery request or other legal process, must make reasonable efforts to notify the parties and any affected non-party participants of the demand.
- 2) Parties and non-party participants who receive a notice of a demand for disclosure from a neutral:
  - a. must respond within 15 calendar days and offer to defend a refusal to disclose the information; or
  - b. if they do not respond within 15 calendar days, they will be deemed to have waived their objections to disclosure of the information.

#### **Section 574(f)**

Evidence that is otherwise discoverable or admissible is not protected from disclosure under this Section merely because the evidence was presented during a dispute resolution proceeding.

#### **Section 574(g)**

The provisions of Section 574 (a) and (b) do not affect information and data that are necessary to document agreements or orders resulting from dispute resolution proceedings.

#### **Section 574(h)**

Information from and about dispute resolution proceedings may be used for educational and research purposes as long as the parties and specific issues in controversy are not identifiable.

#### **Section 574(i)**

Dispute resolution communications may be used to resolve disputes between the neutral in a dispute resolution proceeding and a party or participant, but only to the extent necessary to resolve a dispute between a neutral and party or participant.

#### **Section 574(j)**

A dispute resolution communication between a neutral and a party that is protected from disclosure under this section is also protected from disclosure under FOIA (Section 552(b)(3)).

### **III. Questions & Answers on Confidentiality under the Administrative Dispute Resolution Act of 1996 (ADR Act)**

# GENERAL CONFIDENTIALITY RULES

## 1. What types of communications are confidential?

Subject to certain exceptions, the following two types of communications are potentially confidential under the ADR Act:

### A. A dispute resolution communication.

A dispute resolution communication is any oral statement made or writing presented by a party, nonparty participant or neutral during a dispute resolution proceeding prepared specifically for the purposes of a dispute resolution proceeding. However, written agreements to enter into a dispute resolution proceeding and any written final agreement reached as a result of the proceeding are not dispute resolution communications. *Citation: 5 USC 571(5).*

**Example:** At the outset of the mediation conference, the parties sign an agreement to mediate. During private meetings with the mediator, they each make oral statements and give the mediator documents prepared specifically for use in the mediation. At the conclusion of the mediation, the parties sign a settlement agreement resolving the matter.

The oral statements and written documents prepared specifically for use in the mediation are dispute resolution communications. The agreement to mediate and the settlement agreement are not dispute resolution communications.

### B. A “communication provided in confidence to the neutral.”

A “communication provided in confidence to the neutral” is any oral statement or written document provided to a neutral during a dispute resolution proceeding. The communication must be: (1) made with the express intent that it not be disclosed or (2) provided under circumstances that would create a reasonable expectation that it not be disclosed. *Citation: 5 USC 571(7) and 574 (a).*

**Example:** During private meetings, counsel for the contractor and for the agency separately give the mediator different documents prepared before mediation which contain highly sensitive information. Counsel for the contractor expressly asks the mediator to keep his document confidential; counsel for the agency says nothing about keeping her document confidential. Both documents are “communications provided in confidence to the neutral.” The contractor’s documents are communications provided in confidence because counsel for the contractor expressly asked the neutral to keep it confidential. The agency’s documents are communications provided in confidence because they were provided under circumstances which create a reasonable expectation that they should not be disclosed.

**Example:** An employee during a caucus in a mediation session tells the neutral that he might appear inattentive during the joint session because he has been diagnosed recently with cancer and is taking medicine. He tells the mediator not to share that information with the other party, his supervisor. The information is a communication provided in confidence because the employee provided it to the neutral with the expressed intent that it not be disclosed.

## **2. What confidentiality protection is provided for dispute resolution communications?**

Generally, neutrals and parties may not voluntarily disclose or be compelled to disclose dispute resolution communications. The ADR Act contains specific exceptions to the general rule. (See Question 11) *Citation: 5 USC 574(a), (b)*.

**Example:** A party resolves his EEO complaint through mediation and signs a written agreement settling all issues. The mediator subsequently receives a phone call from another employee asking 1) what was management's position in the mediation, and, 2) what relief was obtained. The mediator, as a neutral, may not disclose to the employee any communications made by management in the dispute resolution proceeding. However, the neutral may provide the employee with a copy of the final agreement which sets forth the relief obtained.

**Example:** During a mediation involving ten parties, two meet in caucus with the mediator and discuss their common interests. Later, a person contacts one of the two parties asking about what the other party said during the caucus with the mediator. The first party may not disclose what the other party said during the caucus.

## **3. What confidentiality protection applies to a "communication provided in confidence" by a party to a neutral?**

Generally, neutrals may not disclose any communication provided to them in confidence. The ADR Act contains specific exceptions to the general rule. (See Question 11.) *Citation: 5 USC 574(a)*.

**Example:** A government contractor during a caucus in a mediation session tells the neutral the details of his proposed "bid" for a government contract. The neutral may not disclose the information because the program participant would have a reasonable expectation that the information would not be shared.

## **4. What is a dispute resolution proceeding?**

A dispute resolution proceeding is an alternative means of resolving an issue in controversy arising from an agency's program, operations or actions. The ADR Act supports a broad reading of the term "dispute resolution proceeding." The ADR Act

broadly incorporates all ADR forms and techniques, including any combination of ADR forms or techniques. In defining an issue in controversy, the ADR Act incorporates disagreements between an agency and parties or between parties. This indicates a legislative intent to provide for the use of ADR processes in an inclusive manner to assist the wide range of situations where disagreements may arise in the conduct of an agency' programs, operations, or actions. A dispute resolution proceeding includes intake and convening stages as well as more formal stages, such as mediation.

*Citation: 5 USC 571(3), (6) and (8).*

**Example:** A neutral is engaged to help resolve a dispute between an agency and one of its contractors. The process managed by the neutral (*i.e.*, mediation, arbitration, or another technique) is a dispute resolution proceeding.

**Example:** A dispute exists between an agency and several other parties with regard to the agency's interpretation of a regulation. The work of a neutral to convene the parties (*i.e.*, to bring them together for purposes of conducting a negotiated settlement) is a dispute resolution proceeding.

## 5. Who is a neutral?

A neutral is anyone who functions specifically to aid the parties during a dispute resolution process. A neutral may be a private person or a federal government employee who is acceptable to the parties. There may be more than one neutral during the course of a dispute resolution process (*e.g.*, an "intake" neutral, a "convener" neutral, as well as the neutral who facilitates a face-to-face proceeding). It is important that agencies clearly identify neutrals to avoid misunderstanding.

The ADR Act supports a broad reading of the term "neutral." In defining neutral, the ADR Act refers to the services of an individual who functions to aid parties in the resolution of an issue in controversy. This indicates the intent of the ADR Act to support the use of neutrals to aid parties during all stages of the resolution of a disagreement, from the convening of participants and design of effective dispute resolution procedures to the conduct of settlement discussions.

The ADR Act provides that a neutral should be acceptable to the parties. In light of the broad variety of ADR services and types of disagreements encompassed by the ADR Act, this requirement must be considered on a case by case basis to provide flexibility in how individual parties "accept" a neutral. If an agency clearly identifies an individual as an intake or convening neutral, an agency or private party who contacts the neutral for the purpose of seeking aid in resolving a disagreement indicates an acceptance of the neutral for that purpose. Likewise, the voluntary participation of a party in an ADR process conducted by a neutral indicates an acceptance of the neutral. *Citation: 5 USC 571(3), (6), (8), and (9) & 573(a).*

**Example:** An employee contacts an agency ADR program seeking assistance in resolving a dispute and describes a dispute to an intake person. The conversation is confidential only if the intake person has been appropriately identified as a neutral by the agency to aid parties in resolving such disputes.

**Example:** An EEO office automatically assigns, on a rotating basis, a trained neutral from within the agency, without consulting the parties. The parties can be deemed to have agreed to the neutral by virtue of their participation.

## 6. Who is a party?

A party is any person or entity who participates in a dispute resolution proceeding and is named in an agency proceeding or will be affected significantly by the outcome of an agency proceeding. Consistent with common legal practice, the obligations of parties extend to their representatives and agents. *Citation: 5 USC 571(10).*

**Example:** An agency convenes a mediation of all affected stakeholders to resolve an environmental dispute. Every person, business entity, state or local government, and non-profit organization that will be significantly affected by the outcome of the process and agrees to participate is a party to the mediation.

## 7. What constitutes disclosure?

Disclosure is not defined in the ADR Act. Disclosure occurs when a neutral, a party, or a non-party participant makes a communication available to some other person or entity by any method.

**Example:** A federal employee is mediating a workplace dispute as a collateral duty. The mediator's supervisor asks for a briefing on the case. Telling the supervisor "dispute resolution communications" or "communications provided in confidence" would constitute disclosure.

## 8. May a party or neutral disclose dispute resolution communications in response to discovery or compulsory process?

In general, neither a neutral nor a party can be required to disclose dispute resolution communications through discovery or compulsory process. Compulsory processes include any administrative, judicial or regulatory process that compels action by an individual. *Citation: 5 USC 574(a) & 574(b).*

**Example:** A neutral receives a notice of deposition from an attorney in a lawsuit regarding a matter which the neutral mediated. The attorney informs her that she will be asked about the statements by the complainant made during the mediation. In the deposition, the neutral may not disclose the complainant's statements because they are dispute resolution communications.

**9. What confidentiality protection is provided for communications by a nonparty participant in a dispute resolution proceeding?**

The term “nonparty participant” is not defined in the ADR Act. However, common usage suggests that a nonparty participant is an individual present during a dispute resolution proceeding other than a party, an agent or representative of a party, or the neutral. This could be an individual who is asked by the neutral to present information for use of the neutral or parties. Dispute resolution communications made by nonparty participants are subject to the same protections and exceptions as are all other dispute resolution communications. A neutral needs to obtain the written consent of all parties and the nonparty participant to disclose such communications. *Citation: 5 USC 574(a)(1).*

**Example:** An expert talks about inflation and wages she prepared for mediation. The communication is confidential and cannot be disclosed by the neutral without the consent of all the parties and the expert.

**Example:** An expert retained by the neutral discusses his environmental impact research and participates in subsequent discussions with the parties. The expert is not prohibited from disclosing any communications from those discussions, absent a signed agreement to that effect.

**10. When in an ADR process do the confidentiality protections of the ADR Act apply?**

Confidentiality applies to communications when a person seeking ADR services contacts an appropriate neutral. A communication made by a party to a neutral is covered even if made prior to a face-to-face ADR proceeding. Confidentiality does not apply to communications made after a final written agreement is reached or after resolution efforts aided by the neutral have otherwise ended. *Citation: 5 USC 571(6), 574(a) and (b).*

**Example:** Two parties have agreed to use an ADR process to try to resolve a dispute and have selected a neutral. Prior to the first session between the parties and the neutral, the neutral communicates independently with each of the parties. The confidentiality provisions of the ADR Act apply to these discussions.

**Example:** The parties to an ADR process have completed a dispute resolution proceeding and signed a settlement agreement. One of the parties subsequently calls the neutral to discuss how the settlement is being implemented. This discussion is not confidential under the ADR Act because the dispute resolution proceeding has already ended.

**EXCEPTIONS TO CONFIDENTIALITY PROTECTION**

**11. Under what circumstances may communications be disclosed under the ADR Act?**

**A. A party's own communications during a dispute resolution proceeding.**

A party may disclose any oral or written communication which the party makes or prepares for a dispute resolution proceeding. *Citation: 5 USC 574(b)(1).*

**Example:** During a separate caucus, the contractor drafts a document showing the financial impact of his breach of contract. The mediation is unsuccessful. The government subpoenas the contractor to produce the document for an administrative hearing. The contractor cannot be compelled to produce the document. She may, however, voluntarily produce it.

**B. A dispute resolution communication that has "already been made public."**

The ADR Act's confidentiality protections do not apply to communications that have already been made public. Although the ADR Act does not define the term, examples of communications that have "already been made public" could include, for example, the following:

1. The communication has been discussed in an open Congressional hearing;
2. The communication has been placed in a court filing or testified about in a court in a proceeding not under seal;
3. The communication has been discussed in a meeting which is open to the public;
4. The communication has been released under FOIA.

*Citation: 5 USC 574(a)(2) & 574(b)(3).*

**C. Communications required by statute to be made public.**

There are a handful of statutes which require certain classes of information to be made public. To the extent that such information is shared during a dispute resolution proceeding the information is not confidential. *Citation: 5 USC 574(a)(3), 574(b)(4).*

**Example:** Section 114(c) of the Clean Air Act states that certain records, reports or information obtained from regulated entities "shall be made available to the public." These communications are not subject to the ADR Act prohibitions on disclosure by a neutral or a party.

#### **D. When a court orders disclosure.**

A court may override the confidentiality protections of the ADR Act in three limited situations. In order to override the confidentiality protections, a court must determine that testimony or disclosure of a communication is necessary to either (1) prevent a manifest injustice, (2) help establish a violation of law, or (3) prevent harm to the public health or safety. The court must also determine, by applying a balancing test, that the need for the information is of a sufficient magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential. *Citation: 5 USC 574(a)(4) & (b)(5).*

**Example (to prevent a manifest injustice):** During a separate caucus in a Federal Tort Claims Act mediation, a husband tells the mediator that his wife's claims to have been paralyzed in an accident were false. Mediation terminates, and the case proceeds to trial. Information about the wife's statements comes to the attention of the insurance company which seeks an order to compel testimony from the mediator. The court, in applying the balancing test in 574(a)(4), may order the mediator to disclose information if it finds that a failure to disclose the information would result in a manifest injustice to the moving party.

**Example (help establish a violation of law):** During a mediation regarding the dismissal of a federal employee, the employee divulges to the mediator that he charged personal goods to his government credit card. In a later action against the employee for misuse of government funds, the neutral is asked to testify about what he learned in the mediation. The court, in applying the balancing test in 574(a)(4), may require the neutral to testify if it determines that the neutral's testimony is necessary to help establish a violation of law.

**Example (prevent harm to the public health or safety):** During mediation of a tort claim, an engineer discloses to the neutral that her structural evaluation indicated serious defects in a building, but that her supervisor refused to accept the report as written and threatened her job security if she did not alter the report. When the case comes to trial, the plaintiff subpoenas the neutral to testify. The court, in applying the balancing test in 574(a)(4), may require the neutral to testify if it determines that the neutral's testimony is necessary to prevent harm to the public safety.

#### **E. In order to resolve a dispute over the existence or meaning of a settlement arrived at through a dispute resolution proceeding.**

The ADR Act creates an exception to the general rule of nondisclosure by a party for the limited purpose of determining the existence or meaning of an agreement arrived at through a dispute resolution proceeding. Parties may also disclose communications as required to enforce an agreement arrived at through a dispute resolution proceeding. *Citation: 5 USC 574(b)(6).*

**Example:** Parties may disclose dispute resolution communications as required to show that a settlement agreement was reached or explore the meaning of the terms of this agreement.

**F. Parties' communications in joint session, with all parties present.**

A neutral may not disclose dispute resolution communications made in joint session. However, except for communications by a neutral, there is no prohibition against a party disclosing communications available to all other parties in the proceeding. *Citation: 5 USC 574(b)(7).*

**Example:** In a joint session, with all parties present, a party admits that she was unaware of the defect in question. The other parties may disclose the information without violating the ADR Act.

**G. Information sought for specific purposes.**

The ADR Act allows for the disclosure of information for educational and research purposes, in cooperation with agencies, governmental entities, or dispute resolution programs. However, it is required that the parties and specific issues in controversy not be identifiable. *Citation: 5 USC 574(h).*

**Example:** An individual who has served as a neutral in a number of agency ADR proceedings may share collected experiences when participating in a training program, provided that the parties and specific issues are not identifiable.

**Example:** An ADR program administrator may provide statistical information to an auditor or inspector who is evaluating the efficiency and effectiveness of an ADR program, provided that the parties and specific issues are not identifiable.

**H. Communications required to resolve disputes that arise between the neutral and a party.**

If there is a dispute between a neutral and a party regarding the conduct of a dispute resolution proceeding, both may disclose dispute resolution communications to the extent necessary to resolve the dispute. *Citation: 5 U.S.C. 574(i)*

**Example:** If a party refuses to pay the neutral for services, the neutral can disclose dispute resolution communications to the extent necessary to establish that payment is due.

**12. Are a neutral's communications to parties in joint session or otherwise provided to all parties confidential?**

Yes. The ADR Act protects communications by a neutral. A party, however, may not use this provision to gain protection for a communication by providing it to the neutral who then provides it to another party. The ADR Act provides that the communication must be "generated" by the neutral, not just passed along by the neutral. *Citation: 5 USC 574 (b)(7). (See H. Rept. 104-841, 142 Cong. Rec. H11108-11 (September 25, 1996).*

**Example:** Early neutral evaluations or settlement proposals provided to the parties by a neutral are protected from disclosure by either the neutral or the parties.

**13. Can confidentiality attach to communications that are provided to or available to fewer than all of the parties?**

Yes. The ADR Act does not prohibit parties from disclosing dispute resolution communications that are "provided to or ... available to all parties to the dispute resolution proceeding." Under a plain reading of the statute, communications are not protected when provided to, or available to, all parties; thus, they remain protected if they are provided to, or are available to, some (but not all) of the parties in a dispute.

The legislative history states, "A dispute resolution communication originating from a party to a party or parties is not protected from disclosure by the ADR Act." H.R. Rep. No. 104-841, 142 Cong. Rec. H11110 (Sept. 25, 1996). The plain language of the statute is not inconsistent with this piece of legislative history, in that it can be interpreted to mean both parties in a two-party ("party to the other party") or all parties in a multi-party dispute ("party to all other parties"). *Citation: 5 U.S.C. 574(b)(7).*

**Example:** Six parties participate in a mediation. The mediator initially convenes a day-long meeting with all parties together in a joint session. The mediator believes that four have similar interests and convenes a separate meeting with just those four. Confidentiality attaches to communications which take place at the separate meeting, since fewer than all parties are present. Only if all six were present, or the information was available to all six, would disclosure be permissible under the (b)(7) exception.

**14. Does the ADR Act prevent the discovery or admissibility of all information presented in a dispute resolution proceeding?**

No. Information presented in a dispute resolution proceeding that is not protected by the ADR Act may be subject to discovery or admissibility as evidence in a subsequent legal action. *Citation: 5 USC 574(f).*

**Example:** During a mediation proceeding in a dispute over a promotion, the complainant produces notes she made during an interview with the selecting official. She shares her interview notes with the neutral and management representative. In private caucus with the neutral, complainant prepares handwritten notes of the neutral's comments regarding the case. When the case goes to litigation, the agency requests discovery of complainant's interview notes, as well as the notes reflecting the neutral's assessment of the case.

The agency would not be prohibited from seeking complainant's notes of the interview with the selecting official. The interview notes are not dispute resolution communications because they were not prepared for purposes of the dispute resolution proceeding. However, the complainant's notes reflecting the neutral's assessment of her case constitute a dispute resolution communication because they were prepared for the purpose of the dispute resolution proceeding.

**15. Does the ADR Act protect against the disclosure of dispute resolution communications in response to requests by federal entities for such information?**

Section 574 of the ADR Act prohibits a neutral or a party from disclosing, voluntarily or in response to discovery or compulsory process, any protected communication. The ADR Act further states that neutrals and parties shall not "be required" to disclose such communications.

A number of federal entities have statutory authority to request disclosure of documents from federal agencies and employees. Examples of such statutes include, but are not limited to, the Inspector General Act (5 USC App.) and the Whistle blower Protection Act (5 USC Section 1212(b)(2)). Further, certain statutes may be read to impose an affirmative obligation to disclose certain classes of information. These include, 18 USC Section 4 (knowledge relating to the commission of a felony) and 28 USC Section 535 (investigation of crimes involving Government officers and employees).

None of the exceptions to the ADR Act's confidentiality provisions directly applies to the above-mentioned authorities. For example, none of the authorities cited above constitutes a requirement that information be "made public" pursuant to ADR Act section 574 (a)(3) and (b)(4). In addition, the judicial override procedure outlined in Section 574 (a)(4) and (b)(5) will not always be available when a conflict between the ADR Act and disclosure statute arises.

In summary a tension among these authorities exists. The issues of statutory interpretation between these differing authorities have not yet been considered in an appropriate forum. Although we do not anticipate that direct conflicts between the ADR Act and one of the disclosure statutes will be common, it is important for agencies, neutrals, and participants to be aware of the potential issue.

The ADR Act's judicial override provision contains a standard for determining if disclosure is necessary despite the Act's general prohibition on disclosure. The judicial override procedure should be followed whenever possible by requesting entities. Use of this statutorily authorized procedure will provide the best guidance to both the ADR community and requesting entities. Even when the override procedure is not available (because of jurisdictional limitations, for example), this standard should be used in determining whether to disclose an otherwise protected communication. The override provision, at section 574(a)(4) & (b)(5), takes into account the need for access to information to prevent manifest injustice, establish violations of law, and prevent harm to public health and safety, while considering the integrity of dispute resolution proceedings in general and the consequences breaching confidentiality.

There are also several practical steps that agencies can take to minimize the likelihood of a dispute over a demand for disclosure of confidential communications. Agency ADR programs and potential requesting entities should enter into a dialogue to establish a framework for how potential demands for disclosure will be handled. The following principles should be included in such a framework:

- Agency ADR programs and requesting entities should educate each other about their respective missions.
- Procedures should be established for access to information that balance the need to prevent manifest injustice, help establish a violation of law, and prevent harm to the public health and safety against the need to protect the integrity of the agency's dispute resolution proceedings.
- ADR programs should identify classes of information that are not confidential, such as budgetary and statistical information regarding the number and types of cases and processes used.
- Requesting entities should use non-confidential information as a basis for information requests.
- Requesting entities should seek confidential information only if the information is not available through other means.
- Requesting entities should seek information from a neutral only if the information is not otherwise available.

- The ADR program and requesting entities should agree to procedures to resolve specific disagreements that arise with regard to the disclosure of information.

## **ALTERNATIVE PROCEDURES TO ESTABLISH CONFIDENTIALITY PROTECTION**

### **16. May parties agree to confidentiality procedures which are different from those contained in ADR Act?**

Yes. Parties may agree to more, or less, confidentiality protection for disclosure by the neutral or themselves than is provided for in the Act.

The ADR Act provides that parties may agree to alternative confidential procedures for disclosures by a neutral. While there is no parallel provision for parties, the exclusive wording of this subsection should not be construed as limiting parties' ability to agree to alternative confidentiality procedures. Parties have a general right to sign confidentiality agreements, and there is no reason this should change in a mediation context.

If the parties agree to alternative confidentiality procedures regarding disclosure by a neutral, they must so inform the neutral before the dispute resolution proceeding begins or the confidentiality procedures in the ADR Act will apply. An agreement providing for alternative confidentiality procedures is binding on anyone who signs the agreement. On the other hand, such an agreement will not be binding on third parties and may not guarantee that dispute resolution communications will be protected by the ADR Act from disclosure to such parties. Consistent with prudent practice, it is recommended that any such agreements be documented in writing. (See Questions 23 and 24 for potential FOIA implications.) *Citation: 5 USC 574(d)(1).*

**Example:** Parties to an ADR proceeding can agree to authorize the neutral to use his or her judgment about whether to voluntarily disclose a protected communication, as long as the neutral is informed of this agreement before the ADR proceeding commences.

**Example:** Parties to an ADR proceeding can agree that they, and the neutral, will keep everything they say to each other in joint session confidential. A third party expert who overhears their discussions is not bound by their agreement unless she also signs it.

## **ISSUES REGARDING THE DISCLOSURE OF PROTECTED COMMUNICATIONS**

**17. What restrictions are put on the use of confidential communications disclosed in violation of the ADR Act?**

If the neutral or any participant discloses a confidential communication in violation of Sections 574(a) or (b), that communication is not admissible in any proceeding that is related to the subject of the dispute resolution proceeding in which the protected communication was made. A dispute resolution communication that was improperly disclosed may not be protected from use in an unrelated proceeding. *Citation: 5 U.S.C. 574(c).*

**Example:** A supervisor and employee are engaged in a very bitter dispute regarding allegations of sexual harassment. They try mediation with a well respected mediator who is considered an expert in federal sexual harassment law. During a separate caucus between the mediator and the supervisor (alleged harasser) the mediator pointedly questioned the strength of the supervisor's defense.

The mediation is unsuccessful, and the EEOC issues a decision finding that the supervisor did not sexually harass his employee. The supervisor is ecstatic and talks to his friends about the situation, mocking some of the "wrong" comments the mediator made.

The employee appeals the case. She learns of the supervisor's reaction to the mediator's comments and wants to use the information in her brief. She will not be able to use the information because (1) the supervisor improperly disclosed information generated by the neutral, and (2) the appeal is a related proceeding.

**Example:** A federal agency and two contractors are mediating a dispute over an alleged breach of contract. During a caucus with the mediator, the two contractors share confidential information about their financial status. After completing mediation, Contractor 1, in violation of the ADR Act, tells Company X about Contractor 2's financial status.

A year later, Company X and Contractor 2 are in a dispute over a different contract in which Contractor 2's financial status is in dispute. Company X wants to use the information disclosed by Contractor 1. Company X would not be precluded by the ADR Act from using the information disclosed by Contractor 1, because the subject of the current proceeding is not related to that of the prior mediation.

**18. What is the penalty for disclosing confidential communications in violation of the statute?**

The ADR Act does not specify any civil or criminal penalty for the disclosure of a protected communication in violation of the Act. However, such disclosure may violate other laws, regulations or agreements of the parties.

**Example:** The parties agree in writing to keep confidential all statements they make in joint session. The agreement includes a provision that anyone disclosing statements made in joint session will be liable for damages. A party issues a press release disclosing statements made in joint session. The other parties may proceed against him in a suit for damages.

**19. What must a neutral do when he or she receives a “demand for disclosure” of dispute resolution communications?**

Although the ADR Act does not define the term, a “demand for disclosure” may be understood as a formal request for confidential information. The demand must be made by a discovery request or some other legal process.

Upon receiving a demand for disclosure of a dispute resolution communication, a neutral must make a reasonable effort to notify the parties and any affected non-party participants of the demand. Notice must be provided even if the neutral believes that there is no basis for refusing to disclose the communication.

Notice should be delivered to the last address provided by a party. Parties have fifteen calendar days, from the date they receive the notice, in which to offer to defend the neutral against disclosure. Therefore, notice should be sent by a process that provides certification of delivery. For example, delivery could be by registered mail, courier, or by any other carrier that provides tracking and certification of delivery. Use of telephone or email communications as notice could be problematic. Since the parties must respond within 15 calendar days or waive their right to object to disclosure, there should be a written record of when the notice was sent and when it was received. In certain rare circumstances, such as a criminal investigation, a neutral may be asked not to notify parties and others (e.g., program administrators) of a request for information. Under such circumstances, the neutral should seek the advice of counsel. *Citation: 5 USC 574(e).*

**Example:** A colleague asks a neutral what happened in a mediation. The neutral must simply refuse to discuss the matter. The neutral does not need to notify the parties of the request since the demand was not a formal request for information.

**Example:** A neutral receives a formal discovery request for information on what happened in a mediation. Despite the fact that the neutral believes that the requested information could be disclosed under the ADR Act, the neutral must notify the parties of this demand for disclosure using the procedures described above.

**20. What can/must parties do when they receive notice of a demand for disclosure from the neutral?**

If a party has no objection to the disclosure of confidential communications, it need not respond to the notice. On the other hand, if a party believes that the sought-after communications should not be disclosed, the party should notify the neutral within 15 calendar days and make arrangements to defend the neutral from the demand for disclosure. Federal agencies should develop departmental procedures for responding to such notices.

**Example:** A party receives notice from a neutral that she has been served with a subpoena from the agency to produce documents and testify in a court proceeding. The party fulfills his responsibility under the Act by notifying the neutral within 15 calendar days that he objects to the demand for disclosure and that he will obtain counsel to defend the neutral.

**21. What responsibilities do agencies have for ensuring that the notification requirement is met?**

An agency does not have a notification requirement under the ADR Act. However, in some Federal ADR programs the neutral may be a Federal employee performing collateral duty. Requiring these neutrals to keep records of parties to dispute resolution proceedings may be unduly onerous and ineffective. Agencies should develop administrative procedures to ensure that the necessary records are retained. It is ultimately the neutral's responsibility to ensure that the notice is sent to the parties.

**Example:** A Federal employee who serves on collateral duty as a mediator for the ADR program of another agency receives a demand for disclosure but does not know how to locate the parties. She approaches the ADR program manager of the other agency for assistance. The program manager provides the neutral with sufficient information to deliver notice as required under the ADR Act.

**22. May a neutral refuse to disclose communications even when the parties have failed to agree to defend the neutral?**

Yes. The ADR Act permits, but does not compel, a neutral to disclose if the parties have waived objections to disclosure under Section 574(e). While the statute is clear that a neutral "shall not" disclose where a party objects, the statute does not say that a neutral must disclose if a party does not object.

The effectiveness and integrity of mediation and other ADR processes is largely dependent on the credibility and trustworthiness of neutrals. In order to safeguard the integrity of ADR programs and to eliminate the potential for eroding confidence in future ADR proceedings, neutrals should be allowed to rely on established codes of ethics

and confidentiality standards to support a decision not to disclose. *Citation: 5 USC 574(a) & (e).*

**Example:** A neutral receives a subpoena requesting disclosure of confidential communications from a dispute resolution process. The parties do not object to the disclosure and have not offered to defend the neutral against the subpoena. The neutral may still, at his or her own expense, resist the subpoena if the neutral objects to the disclosure.

## **ISSUES RELATED TO THE FREEDOM OF INFORMATION ACT (FOIA)**

### **23. What dispute resolution communications are protected from disclosure under FOIA?**

Dispute resolution communications between a neutral and a party that may not be disclosed under the ADR Act are specifically exempted from disclosure under section 552(b)(3) of the Freedom of Information Act. This could include communications that are generated by a neutral and provided to all parties, such as an Early Neutral Evaluation. In addition, other FOIA exemptions may apply.

Since only Federal records are subject to FOIA, dispute resolution communications that are not Federal records are not subject to the disclosure requirements of FOIA. Therefore, this subsection would not apply to oral dispute resolution communications because they are not records. *Citation: 5 USC 574(j).*

**Example:** During mediation of a contract claim, the parties (a contractor and the agency) request a neutral to provide an evaluation of the merits of their respective cases. The neutral agrees, reviews the evidence, and presents each party separately with a written assessment of their respective cases. The contractor submits a FOIA request to obtain a copy of the neutral's written evaluation of the agency's case. The FOIA request can be denied under section 574(j) because the document is a dispute resolution communication generated by a neutral and may not be disclosed under the ADR Act.

### **24. If parties agree to alternative confidentiality procedures, are dispute resolution communications subject to FOIA?**

Parties may agree to confidentiality procedures that differ from those otherwise provided in the Act. Parties should be aware, however, that the FOIA exemption might not apply to all the communications that are protected under their agreement to use alternative confidentiality procedures.

If the alternative confidentiality procedures agreed to by the parties provide for less disclosure than the ADR Act permits, those dispute resolution communications that

would not be protected under the ADR Act are also not protected by the FOIA exemption in section 574(j). Parties cannot contract for more FOIA protection than the ADR Act provides. *Citation: 5 USC 574(d) & (j).*

**Example:** Parties enter into a confidentiality agreement as part of an agreement to mediate. The parties agree to keep statements made and documents presented during joint session confidential. Documents that are made available by the parties during joint session are not protected by the FOIA exemption in 574(j), even though they are provided by contract to be kept confidential.

## **OTHER CONSIDERATIONS**

### **25. Do the ADR Act's confidentiality provisions apply differently to government and private sector neutrals?**

No. There are, however, certain circumstances in which the choice of neutral may affect disclosure related to ADR processes. For example, because a private neutral's records are likely not deemed "agency records," they likely will not be subject to FOIA or to record retention requirements. Additionally, the IG Act authorizes an IG to subpoena a private neutral, but not a government neutral. Finally, a private neutral is not subject to some of the statutory provisions that create a tension with the ADR Act's non-disclosure requirements (See Question 15).

## **IV. GUIDANCE ON CONFIDENTIALITY STATEMENTS FOR USE BY NEUTRALS**

Neutrals should make introductory remarks at the outset of a dispute resolution process explaining applicable ADR Act confidentiality provisions. Which provisions apply will vary, depending on such things as the type of ADR used, the number of parties participating, and the issues involved. In addition, agencies may choose to highlight or supplement ADR Act provisions to meet specific programmatic needs. We provide guidelines below to assist neutrals in crafting appropriate introductory confidentiality statements.

An introductory confidentiality statement should address the following topics:

- 1) Application of the ADR Act to administrative ADR processes;
- 2) The intent of the ADR Act to provide confidentiality assurances for communications between the parties and the neutral occurring during an ADR proceedings;
- 3) Confidentiality between and among parties, consistent with this Guidance;

- 4) Exceptions to the Act's nondisclosure provisions pertinent to the particular dispute ;
- 5) Availability of alternative confidentiality protections through written agreement and applicable limitations; and
- 6) Authorities other than the ADR Act that may also apply.

**Example:** The confidentiality provisions of the Administrative Dispute Resolution Act apply to this mediation. The Act focuses primarily on protecting private communications between parties and the mediator. Generally speaking, if you tell me something during this process, I will keep it confidential. The same is true for written documents you prepare for this process and give only to me.

There are exceptions to the confidentiality provisions in the Act. For example, statements you make with all the other parties in the room or documents you provide to them are not confidential. Also, in unusual circumstances, a judge can order disclosure of information that would prevent a manifest injustice, help establish a violation of law, or prevent harm to public health and safety.

You can agree to more confidentiality if you want to. For example, you can agree to keep statements you make or documents you share with the other parties confidential . If you want to do this, everyone will need to agree in writing. Outside parties may, however, still have access to statements or documents as provided by law.

**[This is only an example of one possible confidentiality statement. It is important that this statement be tailored to fit the needs of each particular case.]**