

Confidentiality Protection in a Federal Alternative Dispute Resolution Proceeding

Quick Reference Guide

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This is a “Quick Reference Guide” on confidentiality protections for parties engaged in an alternative dispute resolution (ADR) process, with EPA, using a neutral third-party. The guide identifies the types of communications that are protected by the [Administrative Dispute Resolution Act of 1996](#) (ADR Act), the neutral and parties’ obligations of non-disclosure, when FOIA Exemption 3 can be applied, and how to contract for additional confidentiality protection.

Overview

Confidentiality is a critical component of a successful ADR process. Guarantees of confidentiality allow parties to speak openly without the fear that statements made during the ADR process will be disclosed to others. There are a number of statutes and mechanisms that provide confidentiality protection. Among them, the ADR Act provides confidential protection to oral and written communications made during a federal ADR proceeding.

Limitations on Confidentiality Protections for Communications Between Parties

The confidentiality provisions of the ADR Act primarily protect communications between the parties and the neutral.

- The ADR Act forbids neutrals from disclosing any documents prepared by or for the neutral and from voluntarily testifying as a witness regarding the communications made during the ADR process.
- The ADR Act states that the neutral shall not be required to disclose by compulsory process such communications except in narrowly defined circumstances.
- **The ADR Act does not provide confidentiality protections for documents shared directly by a party with all other parties to the process.** (The parties may, however, grant the neutral discretion to share documents with other parties. Documents shared by the neutral are protected by the ADR Act’s confidentiality provisions).
- **The ADR Act does not provide confidentiality protections for direct communications between parties or for statements made during the ADR process when the neutral and all parties are present in joint session.**



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May Parties Agree to Alter the ADR Act Confidentiality Terms?

The ADR Act expressly permits parties to agree to alternative confidentiality protections for disclosures by themselves or by the neutral, as long as all parties and the neutral agree in writing to the alternative provisions in advance.

- For example, parties may agree to hold as confidential among themselves communications not protected by the ADR Act, such as information available to all parties in joint session.
- **However, any written communication protected by an agreement more stringent than the ADR Act may be vulnerable to disclosure to third parties through FOIA and other compulsory legal processes.** (See below how written negotiation communications could be protected by Federal Rule of Evidence 408).

How to Contract for Additional Confidentiality Protection

Parties can agree to increase or waive confidentiality protections in a written agreement.

- **Prior to entering an ADR process, especially in the context of ongoing or likely litigation, it is recommended that participants sign an ADR Agreement.**
 - The ADR Agreement is a document signed by all parties, prior to entering an ADR process, that establishes the parties' understanding of the process.
- The parties' agreement regarding confidentiality can be captured either in a written confidentiality agreement or included as a provision of the ADR Agreement.
- To allow parties to speak openly during the ADR process, **it is recommended that parties agree to hold confidential oral and written communications made during the ADR process when the neutral and all parties are present.** Below is a sample confidentiality clause:

Confidentiality: To promote frank and productive discussion, the parties agree that the ADR process is confidential. The parties agree not to disclose oral and written communications made during the ADR process, including settlement terms, proposals, offers, or other statements, whether made privately to the neutral or when all parties are present.

Confidentiality Under the ADR Act

The ADR Act applies if an ADR process is used to address an issue in controversy related to a federal administrative program.

What is an ADR Process?

Any process in which (a) means of dispute resolution other than litigation are used to resolve an issue in controversy, (b) a neutral is used, and, (c) specified parties participate. 5 U.S.C. 571(6). Intake and convening are included in the process.

When is Someone Serving as a Neutral?

The ADR Act provides three main criteria that must be met: (a) the person must be acting to assist the parties to resolve a specific dispute; (b) the person must be accepted by all parties; and (c) the person must have no conflict of interest with respect to the issues or parties (except as disclosed and not objected to by the parties).

What does the ADR Act Protect?

The ADR Act protects “dispute resolution communications” and “communications made in confidence” between the neutral and parties.

- **Dispute Resolution Communications:** Statements, including oral, telephone, written, or electronic, made during the process by a party, a non-party participant, or the neutral, or documents submitted to or prepared by the neutral, with the **exception of written agreements to enter into the ADR process and the final written settlement agreement.** 5 U.S.C. 571(5).
- **Communication Made in Confidence.** Communications, including oral, written, nonverbal, or electronic, with a neutral that are provided with the express intent that it not be disclosed or under circumstances that create a reasonable expectation by the source of nondisclosure. 5 U.S.C. 571(7).

What Types of ADR Communications may be Disclosed by a Neutral or Party?

1. Parties may disclose their own communications.
2. **Parties may disclose statements made by other parties when all parties are present in joint session.** This includes settlement offers, though settlement offers may be inadmissible in court. (See above in “How to Contract for Additional Confidentiality Protection” how parties can agree to protect joint session communications).
3. **Some dispute resolution communications are required to be made public by statute.** For example, regardless of confidentiality agreement clauses, minutes and records of a negotiated rulemaking committee are required to be publicly available, 5 U.S.C. 566. Proposed CERCLA settlements must be published in the Federal Register. 42 U.S.C. 9622(i). In these cases, the neutral may disclose the communications only if the neutral is the sole person reasonably available to do so. See also the FOIA discussion below.
4. Communications which occur or are exchanged during an ADR process but were produced for an entirely different purpose, and are not otherwise protected from disclosure, such as a document required to be prepared by regulation or discussions regarding an unrelated subject.
5. When all parties and the neutral consent to a disclosure in writing, and if applicable, a non-party who provided confidential communication also consents.
6. When the dispute resolution communication has already been made public.
7. When a court determines that disclosure is necessary to prevent a manifest injustice, establish a violation of law, or prevent harm to the public health or welfare, and that these concerns are of sufficient magnitude 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.

What are the Parties' Obligation of Non-Disclosure?

Unless the parties agree otherwise:

- Materials provided to the neutral in private caucus may not be disclosed either by the neutral, or by parties other than the party providing the materials.
- Parties may not disclose communications made by a neutral, even if the communications were made when all parties were present.

What is a Neutral's Obligation of Non-Disclosure?

A neutral (including EPA employees serving as neutrals) generally may not voluntarily disclose or be required to disclose by compulsory process any dispute resolution communications or any communication provided by the party to the neutral in confidence.

- Exceptions to this duty are enumerated above ("What Types of Communications May Be Disclosed by a Neutral or Party" #3-7).
- Depending on the jurisdiction a mediator's local codes of ethics may include additional duties of non-disclosure.

Do the Federal Rules of Evidence provide Additional Confidentiality Protections?

Yes, Federal Rule of Evidence 408 generally prohibits the admission into evidence of any communication made by a party during a negotiation regarding an offer of settlement or compromise.

Does the ADR Act Provide an Exemption from Freedom of Information Act Requests?

Yes, the ADR Act contains an express prohibition covering the release of confidential dispute resolution communication between a neutral and a party or parties. 5 U.S.C. 574(j). In responding to a FOIA request, the Agency may assert FOIA Exemption 3, which allows the withholding of information prohibited by another federal statute, as a basis to withhold disclosure of any confidential communication in the possession of an internal neutral.

- *This protection from FOIA does not apply to communications not protected by the ADR Act, such as written communications shared directly by a party with all other parties to the process even if the parties have agreed in writing that such communications are confidential.*

May the Neutral in an Internal EPA ADR Process Disclose Confidential Dispute Resolution Communications to EPA Personnel who are not Directly Involved in a Dispute?

Generally, no. Neutrals in EEO or other internal EPA cases may not disclose confidential dispute resolution communication to any uninvolved EPA personnel, including management. However, protected communications may be disclosed in two situations:

1. Confidential communication may be disclosed to another person if that person is serving as a neutral for the same parties in the same matter.
2. Tentative settlements may be disclosed to another EPA employee for the limited purpose of obtaining legal review or management feedback and approval.

Additional Guidance for Specific Situations

Additional guidance on the application of the confidentiality requirements of the ADR Act or court rules to specific situations may be obtained from the EPA ADR Counsel, ADR Law Office, Office of General Counsel. (Contact information at <https://www.epa.gov/adr/epa-alternative-dispute-resolution-contacts>).