

TEN THINGS
YOU SHOULD KNOW ABOUT THE
CONFIDENTIALITY PROVISIONS
OF THE
ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996

Pub. L. 104-320, 110 Stat. 3870 (1996)

1. The Act Provides Explicit, Broad, and Mandatory Protection Confidentiality

Confidentiality is often critical to successful dispute resolution. To encourage the use of ADR and to protect the integrity of dispute resolution proceedings and the confidence of parties in future proceedings that their communications will remain confidential, the Administrative Dispute Resolution Act of 1996 provides explicit, broad, and mandatory confidentiality protection. Section 574 of the Act (5 U.S.C. §574) prohibits both the neutral and the parties from any voluntary or compelled disclosure of dispute resolution communications in any type of case or proceeding, except as specifically provided for under the Act.

2. The Statutory Definitions are an Important Part of Confidentiality Protection

The confidentiality provisions of §574 incorporate terms that are defined by the Act in 5 U.S.C. §571. As defined by §571:

- "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. 5 U.S.C. §571(6).
- "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 a nonparty participant. 5 U.S.C. §571(5).
- "in confidence" means that information is provided with the expressed intent of the source that it not be disclosed, or under circumstances that would create the reasonable expectation on behalf of the source that the information will not be disclosed. 5 U.S.C. §571(7).

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7-1-99

A written agreement to enter into a dispute resolution proceeding, a final written agreement resulting from a dispute resolution proceeding, and an arbitral award in a proceeding are excluded from the §571(5) definition of a "dispute resolution communication," and, therefore, are not entitled to confidentiality protection

2. The Neutral must be Involved in the Communication

Involvement of the neutral in the communication is required for confidentiality protection. The Act protects communications only between the neutral and the parties because the confidentiality of those communications is perceived as a key to successful dispute resolution. Communications between and among the parties are afforded no greater, and no less, confidentiality protection than any unassisted settlement negotiations.

3. Additional Protection for Communications Originating from the Neutral

Specific confidentiality protection is provided in §574(b)(7) for communications originating from the neutral and provided to all parties in the proceeding, such as early neutral evaluations and settlement proposals. This additional protection is intended to facilitate the neutral's use of such techniques in resolving disputes. See, "Joint Explanatory Statement of the Committee of Conference," appended to the Conference Report of the Administrative Dispute Resolution Act of 1996 (H. Rept. 104-841). 142 Cong. Rec. H11108-11 (daily ed., September 25, 1996).

4. Disclosure by the Neutral Prohibited Except in Specific Circumstances

Disclosure by the neutral is governed by §574(a), which provides that 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" except in four (4) specific circumstances:

- _ (1) all parties to the proceeding, or a nonparty who provided the communication, and the neutral consent to the disclosure in writing; or
- _ (2) the communication has already been made public; or
- _ (3) the communication is required by statute to be made public, and no other person but the neutral is reasonably available to make the disclosure; or

- _ (4) a court determines that disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health or safety.

Voluntary disclosure requires prior notice and written consent, and the Act expresses a preference for seeking confidential information first from the parties, rather than the neutral. Where disclosure is contested, the Act provides, in §574(a)(4), for a judicial determination based on express statutory criteria.

2. Disclosure by Parties Prohibited Except in Specific Circumstances

Disclosure by a party is governed by §574(b), which provides that 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" except in seven (7) specific circumstances:

- _ (1) the communication was prepared by the party seeking disclosure; or
- _ (2) all parties to the proceeding consent to the disclosure in writing; or
- _ (3) the communication has already been made public; or
- _ (4) the communication is required by statute to be made public; or
- _ (5) a court determines that disclosure is necessary to prevent an injustice, establish a violation of law, or prevent serious harm to the public health or safety; or
- _ (6) disclosure of the communication is relevant to determining the existence or meaning of an agreement or award resulting from a dispute resolution proceeding, or enforcement of it; or
- _ (7) except for communications generated by the neutral, the communication was provided or available to all parties to the proceeding.

2. Improperly Disclosed Communications are Not Admissible

To enforce nondisclosure, the Act provides, in §574(c), that a dispute resolution communication disclosed by the neutral or by the parties, in violation of either §574(a) or §574(b), is not admissible in any proceeding relating to the issue(s) in controversy for which the communication was made.

In addition, if a demand is made on the neutral for disclosure of a communication through discovery or other legal process, §574(e) requires the neutral to make reasonable efforts to notify the parties and affected nonparty participants of the demand. Parties and affected nonparties have 15 days after notification to offer to defend a neutral's refusal to disclose. If no offer to defend is made, parties and affected nonparties are deemed to have waived all objection to disclosure.

3. The Act Provides Protection Against Abuses of Confidentiality Protection

While providing broad and mandatory confidentiality protection for dispute resolution communications, the Act also makes clear that this protection should not be used as a sham. In the regard, §574(f) clarifies that otherwise discoverable evidence cannot be protected from disclosure simply by presenting it in the course of a dispute resolution proceeding; and Congress emphasizes that efforts to thwart or abuse any confidentiality protection (e.g., by passing a communication from one party to another through the neutral) will render the protection inapplicable. See, "Joint Explanatory Statement of the Committee of Conference," appended to the Conference Report of the Administrative Dispute Resolution Act of 1996 (H. Rept. 104-841). 142 Cong. Rec. H11108-11 (daily ed., September 25, 1996).

4. Confidential Communications Exempt from Disclosure under the Freedom of Information Act

The Freedom of Information Act (FOIA), 5 U.S.C. §552, requires federal agencies to make agency records available to the public on request, and "agency records" are defined as documents or information created or obtained by an agency. There are a number of exemptions to FOIA disclosure, including "records that are specifically exempted from disclosure by statute...." 5 U.S.C. §552(b)(3).

In the Administrative Dispute Resolution Act of 1990, Congress had declared that §574 was not a statute exempting disclosure under FOIA. Consequently, concerns arose about the

use of ADR processes to resolve federal agency disputes. In particular, federal agencies were concerned they might be required to disclose confidential agency information as a result of participating in a dispute resolution proceeding. Private parties, who enjoy confidentiality protection for settlement discussions under Rule 408 of the Federal Rules of Evidence, were also concerned that using ADR to resolve disputes with the federal government might permit business competitors to force disclosure of proprietary information that had been revealed in a dispute resolution proceeding.

Congress responded to these concerns in the 1996 Act by inserting a new subsection (j) exempting disclosure under FOIA: "(j) A dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section [i.e., §574] shall also be exempt from disclosure under section 552(b)(3)." Thus, dispute resolution communications that qualify for confidentiality protection under §574, including communications generated by a neutral and provided all parties, such as early neutral evaluations and settlement proposals, are also exempt from disclosure under FOIA.

5. Alternative Procedures Possible for Disclosure by a Neutral

Under §574(d)(1) and (2), parties in a dispute resolution proceeding may agree to alternative confidential procedures for disclosures by the neutral, rather than the §574(a) procedures; but to qualify for protection under §574(j) (i.e., exemption from FOIA disclosure), the alternative confidential procedures may not provide for less disclosure than the §574 procedures.

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5 U.S.C. §574. Confidentiality.

(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).

5 U.S.C. §571. Definitions.

For the purposes of this subchapter, the term --

(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, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof;

(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;