

**Can We Talk? Addressing Conflict Among Public Officials**

Jeffrey Clark, Esq.  
Lenny Eliason

Public Access to Information **18**  
CONFERENCE

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**IS MEDIATION A "MEETING" OF A PUBLIC BODY UNDER THE SUNSHINE LAW?**

- CARVER V. TOWNSHIP OF DEERFIELD, 139 OHIO APP.3D 64, (11TH DIST. 2000)
  - "A MEDIATION PROCEEDING MAY BE VIEWED AS A QUASI-JUDICIAL PROCEEDING BECAUSE IT SEEKS TO RESOLVE A DISPUTE REQUIRING EVALUATION AND RESOLUTION."
- RELIES ON TBC WESTLAKE V. HAMILTON CO. BD. OF REVISION, 81 OHIO ST.3D 58, 62 (1998) (APPEAL COULD BE TAKEN FROM BTA B/C "IS A QUASI-JUDICIAL PROCEEDING THAT SETTLES A 'JUSTICIABLE DISPUTE REQUIRING EVALUATION AND RESOLUTION.'")
- R.C. 121.22(G)(3) – PENDING OR IMPENDING LITIGATION, INCLUDE PUBLIC BODY'S ATTORNEY
- R.C. 121.22(G)(4) – COLLECTIVE BARGAINING SESSION WITH PUBLIC EMPLOYEES
- JUST CONDUCT MEDIATION WITHOUT A MAJORITY OF MEMBERS PRESENT

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**MEDIATION RECORDS – STATUTORY EXCEPTION**

**R.C. Chapter 2710 and R.C. 149.43 – confidentiality**

**2710.07** – Except as provided in sections 121.22 and 149.43 of the Revised Code, mediation communications are *confidential* to the extent agreed by the parties or provided by other sections of the Revised Code or rules adopted under any section of the Revised Code.

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**MEDIATION RECORDS – STATUTORY EXCEPTION**

**R.C. Chapter 2710 and R.C. 149.43 – privilege**

**149.43(A)(1)** ... "Public record" does not mean any of the following: ... (i) Records containing information that is confidential under section 2710.03 ...of the Revised Code.

- Broad and self-defined exception. If the parties, agree, then there is a discretionary exception. Dissolves if parties no longer agree (any party can waive this provision)

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**MEDIATION RECORDS – STATUTORY PRIVILEGE**

**R.C. Chapter 2710 – application:**

2710.01(H) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

2710.02(A) Except as otherwise provided in division (B) or (C) of this section, sections 2710.01 to 2710.10 of the Revised Code apply to a mediation under any of the following circumstances:

- ... (2) The mediation parties and the mediator agree to mediate in a record that demonstrates *an expectation that mediation communications will be privileged against disclosure.*

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**MEDIATION RECORDS – STATUTORY PRIVILEGE**

**R.C. Chapter 2710 – privilege possession:**

2710.03(B) *In a proceeding*, the following privileges apply:

- (1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.
- (2) A mediator may refuse to disclose a mediation communication. A mediator may prevent any other person from disclosing a mediation communication of the mediator.
- (3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

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MEDIATION RECORDS – STATUTORY PRIVILEGE

R.C. Chapter 2710 – *privilege waiver*

2710.04(A) A privilege under section 2710.03 of the Revised Code may be waived in a record or orally during a proceeding if it is *expressly waived by all mediation parties* and by whichever of the following is applicable:

- (1) In the case of the privilege of a mediator, it is expressly waived by *the mediator*.
- (2) In the case of the privilege of a nonparty participant, it is expressly waived by *the nonparty participant*.

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MEDIATION RECORDS – STATUTORY PRIVILEGE

R.C. Chapter 2710 – *privilege*

2710.05(A) There is no privilege under section 2710.03 of the Revised Code for a mediation communication to which any of the following applies:

- (1) [written agreement signed by all parties]
- (2) [is available to the public under section 149.43 or made during a mediation session that is open, or required by law to be public]
- (3) [is imminent threat of bodily injury or violent crime]
- (4) [is used to plan, commit or conceal ongoing criminal activity]
- (5) [is sought as proof of claim of mediator misconduct or malpractice]
- (6) [is sought as proof of claim of misconduct against party, nonparty participant, or party representative based on conduct during a mediation]
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SETTLEMENT COMMUNICATION PRIVILEGE

*Goodyear Tire and Rubber Co. v. Chiles Power Supply, 332 F.3d 976 (2003)*

- Creates a new federal privilege (6<sup>th</sup> Cir. only)
- Covers communications in furtherance of settlement negotiations
- Does not cover fact of settlement negotiations, or final settlement document
- “The public policy favoring secret negotiations, *combined with the inherent questionability of the truthfulness of any statements made therein*, lead us to conclude that a settlement privilege should exist ...”

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SETTLEMENT COMMUNICATION  
PRIVILEGE - NOT

*Ohio Consumers' Counsel v. P.U.C.O.*, 111 Ohio St. 3d 300 (2006)

- Did not find *Goodyear* persuasive
- Ohio Supreme Court raised question of whether *Goodyear* was wrongly decided, as a diversity action which should have relied on state, not federal law as the source of any applicable privilege.
- Per *Ohio Consumers' Counsel*, no such privilege under Ohio law

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SETTLEMENT COMMUNICATION  
PRIVILEGE - NOT

*State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St. 3d 126 (2002)

- No exception for draft settlement records [other than R.C. 2710.03, i.e., in a proceeding]
- For good or ill, civil litigants are not limited to discovery and can also make public records requests

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MEDIATION RECORDS – OTHER  
EXCEPTIONS

**Medical Records**

**Trade Secrets**

**Other?**

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**QUESTIONS?**

JEFF CLARK, PUBLIC RECORDS MASTER  
OHIO COURT OF CLAIMS

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**Contact Information**

**Jeffrey Clark, Esq.**  
Public Records Special Master  
Ohio Court of Claims  
65 South Front Street  
Columbus, OH 43215  
614.387.9862

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**Contact Information**

**Lenny Eliason**  
Athens County Commissioner  
Athens County Commissioners  
15 S Court Street  
Athens, OH 45701  
740.592.3219

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## PUBLIC RECORDS MEDIATION BARGAINING POINTS

The following are possible options for facilitation and compromise in public records disputes. It is an evolving list, so please share additional options as they are developed.

Interest	Requester Options	Public Office Options
<b>Speed</b>	<ul style="list-style-type: none"> <li>Trim request size</li> <li>Prioritize sub-requests</li> <li>Clarify/specify request</li> <li>Inspection v. copying</li> </ul>	<ul style="list-style-type: none"> <li>Rolling release</li> <li>Scan and e-mail</li> <li>Include non-records</li> <li>Waive exemption(s)</li> <li>Offer free copies when inspection requested</li> </ul>
<b>Information</b>	<ul style="list-style-type: none"> <li>Agree to official statement or other release of information, rather than records</li> </ul>	<ul style="list-style-type: none"> <li>Official statement</li> </ul>
<b>Access</b>	<ul style="list-style-type: none"> <li>Agree to redaction of non-records</li> <li>Agree to redaction of non-responsive records</li> <li>Concede specific exemption(s)</li> <li>Agree to larger, but searchable, record set</li> </ul>	<ul style="list-style-type: none"> <li>Waive exemption(s)</li> <li>Include non-records</li> <li>Explain records maintenance &amp; access using statutes, admin. rules, and records retention schedules</li> <li>Grant interview</li> <li>Agree to a specific server or backup search</li> <li>Agree to start posting online</li> </ul>
<b>Burden</b>	<ul style="list-style-type: none"> <li>Trim request</li> <li>Rolling release</li> <li>Request shared docs from "primary" office, or parts from multiple offices, to spread burden</li> <li>Agree to extend response time to a specific, or conditional, date</li> <li>Jointly rewrite acceptable request</li> </ul>	<ul style="list-style-type: none"> <li>Include non-records</li> <li>Waive exemption(s)</li> <li>Scan and e-mail</li> <li>Jointly rewrite acceptable request</li> <li>Agree to start posting online</li> </ul>

<b>Costs</b>	Agree to pay more than “actual costs” Accept less costly or burdensome medium	Waive or reduce costs Waive advance payment
<b>Finality</b>	Agreement not to sue	Offer to update on a specific, or conditional, date
<b>Predictability</b>	Designate areas for discovery vs. public records requests	Accept standing request
<b>Public Perception</b>	Agree to note public office’s cooperation and compliance in media story	Agree to note (in any public statement) requester’s willingness to compromise
<b>Openness/Good will</b>	Arrange for periodic future contact	Arrange for periodic future contact Agree to editorial boards
<b>Confidentiality</b>	Verbal request	Inspection before copy request

**MEDIATOR'S WORKSHEET**

<b>For Requester:</b>	<b>For Public Office:</b>
<b>OPENING</b>	<b>STATEMENTS</b>
<b>REAL UNDERLYING</b>	<b>INTERESTS</b>



**AREAS OF AGREEMENT**

**OR PRIOR SATISFACTION**

**PROPOSALS**

**AGREEMENT**