

Public Records and the UMA by Shirley Cochran

To understand the interplay between the public records section and the UMA sections concerning mediations with persons representing public entities, the difference between what is confidential and what is privileged under the UMA needs to be emphasized. The UMA provides the mediation communications are privileged when used in a proceeding; mediation communications can be confidential by agreement of the parties. In other words, something said in a mediation could be kept out of court under the UMA but not out of the papers if the parties did not agree to keep the information confidential.

Section 149.43 (A)(1)(i) was amended by the UMA to state that a “Public record” does not mean any of the following: “Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code.” Section 2710.03 refers to mediation communications being privileged, who holds the privilege and that if information is otherwise discoverable, is not privileged. In other words, if the UMA provides that records are privileged under the statute, the records are not considered public records, which require disclosure under that act. Apparently, it was easier to make the records not public records rather than amend the section to include all the provisions dealing with privilege under the UMA sections.

What makes this area confusing is section 2710.07 of the UMA, which states: “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.” This section only permits what is confidential to be what is privileged under the UMA. In other words, a public entity or official can enter into a mediation and the parties can expect the records resulting from the mediation (prepared materials before and notes during or jotted down after) to be considered confidential only if the records would be protected under the UMA as privileged.

Some may argue that the courts may have to decide, if the mediation communications concerning a public entity will be confidential even if the communication is being used other than in a proceeding, but there appears to be no doubt that such a mediation communication is privileged if use is sought in a proceeding as it is not a public record.

The first determination to be made is whether or not a party to the mediation is a representative of a public agency (includes school districts and township trustees) or public official. If not, there is no need to be concerned about public records. If so, then if the mediation communication is privileged under the UMA, it will not be a public record and will not have to be produced by the public entity upon request by any citizen.