

Guidelines for Disclosure of Mediation Communications
for Research, Evaluation or Educational Purposes
under s 8(2)(e) of the Mediation Ordinance (Cap. 620)

Purpose

1. These guidelines are compiled and proposed by the Steering Committee on Mediation chaired by the Secretary for Justice with a view to assisting persons intending to disclose/use mediation communications for research, evaluation or educational purposes to comply with section 8(2)(e) of the Mediation Ordinance, Cap. 620 (“Ordinance”).

Background

2. The protection of the confidentiality of mediation communications is of paramount importance to the maintenance of the integrity of mediation as an effective alternative dispute resolution mechanism. Hence, section 8(1) of the Ordinance provides: “*A person must not disclose a mediation communication except as provided by subsection (2) or (3).*”
3. At the same time, the availability of various information and data about mediation (including in appropriate circumstances some mediation communications that are otherwise confidential) for research, evaluation and educational purposes is, subject to the protection of the identity of the person to whom an otherwise confidential mediation communication relates, needed to facilitate the development of mediation in Hong Kong.
4. Balancing these two interests, section 8(2)(e) of the Ordinance provides for an exception to the prohibition against disclosure of a mediation

communication¹ under section 8(1) by permitting a “person” to disclose a “mediation communication” if “the disclosure is made for research, evaluation or educational purposes without revealing, or being likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates”.

Guidelines

5. Section 8(2)(e) applies to any mediation communication relating to a mediation to which the Ordinance applies². It does not matter whether the mediation communication is made before, on or after the date of commencement of the Ordinance³ (i.e. 1.1.2013).
6. Any person⁴ who proposes to disclose a mediation communication for research, evaluation or educational purposes must, before he does so, himself consider and be satisfied as to:

¹ A “mediation communication” is defined by section 2(1) to mean

“(a) anything said or done;
(b) any document prepared;
(c) any information provided,
for the purpose of or in the course of mediation, but does not include an agreement to mediate or a mediated settlement agreement”.

² Section 5(1) makes the Ordinance applicable to (1) any mediation wholly or partly conducted in Hong Kong or (2) any mediation under an agreement to mediate that provides for the application of the Ordinance or the law of Hong Kong to the mediation. Provided that either of these circumstances applies, section 5(4)(a) and (b) also render irrelevant whether the agreement to mediate is made before, on or after 1.1.2013 or entered into in Hong Kong or elsewhere or whether the mediation is conducted before, on or after 1.1.2013 or completed before that date.

³ See sections 5(3) and (4).

⁴ The persons who are entitled to make disclosure of a mediation communication under section 8(2) are not limited to the mediator, but may include the parties to, and other participants, in the mediation.

- (1) the specific research, evaluation or educational purposes for which the mediation communication is being collected;
 - (2) the relevance of the mediation communication to such research, evaluation or educational purposes; and
 - (3) the extent to which the mediation communication is relevant to such research, evaluation or educational purposes.
7. Disclosure should be made of only those parts of a mediation communication that are relevant to the specific research, evaluation or educational purposes for which data is being collected.
8. Caution as advised in paragraphs 6 and 7 above should be taken regardless of whether:
 - (1) the mediation communication is to be used for research, evaluation or educational purposes by a person other than the person in possession of the mediation communication to whom disclosure of the same is required for such purposes;
 - (2) the mediation communication is to be used for research, evaluation or educational purposes by the person in possession of the same together with others to whom disclosure of the communication is required to be made for such purposes; or
 - (3) the mediation communication is to be used for research, evaluation or educational purposes by the person in possession of the same and disclosure by him takes the form of publication or distribution of the research or evaluation findings or results or of the educational materials.

9. The mediation communication disclosed must not contain any information that will reveal or is likely to reveal, directly or indirectly, the identity of a person to whom the mediation communication relates.
10. The burden of taking adequate steps to effectively anonymize a mediation communication rests with any person making disclosure of the same.
11. The expression "*a person to whom the mediation communication relates*" is, on its face, wide enough to be not restricted to the parties to the mediation but includes any person with whom the information is concerned.
12. Any information that may identify a person to whom the mediation communication relates or render him identifiable must not be disclosed.
 - (1) Such information is not limited to the person's name, addresses, telephone/fax number, electronic mail addresses, identity card number, position in the material company, agency or organization, the parties, their solicitors' case reference numbers including legal aid references, or other direct personal identifiers which should all be removed or redacted.
 - (2) The requirement for anonymity of the person to whom the mediation communication relates may not be complied with by, for example, just removing or redacting direct personal identifiers or substituting them with pseudonyms such as those mentioned in sub-paragraph (1) hereof.
 - (3) A person intending to disclose a mediation communication pursuant to section 8(2)(e) must also be mindful of the following:

- (A) that Hong Kong is a relatively small community;
 - (B) that the Hong Kong public has an increasingly avid interest in court proceedings and the disputes giving rise to them, especially those involving high profile personalities or arising from high profile events;
 - (C) that the public's awareness in this regard is also heightened by media investigation, reporting and coverage of court cases and the disputes underlying them;
 - (D) that under the principle of open justice, save for a few exceptions, all interlocutory and final judgments and decisions of the courts (with the parties fully identified and the material facts and circumstances giving rise to their dispute set out) are published.
- (4) In these circumstances, in some cases:
- (A) Any information about the subject-matter or issues of the dispute being mediated or its surrounding facts or circumstances contained in a mediation communication, if disclosed, may indirectly lead to the identification of the person to whom the mediation communication relates, especially by people who actually know of him and/or about the dispute.
 - (B) The more high profile the dispute is or the more unusual the facts or circumstances of the case are, the greater is such risk of indirect identification.

- (C) The protection of the identity of the person to whom the mediation communication relates may therefore require the editing or adaptation of the subject-matter and issues of the dispute and/or its underlying facts and circumstances before such communication can be disclosed.
- (D) There may even be situations where the risk of identification of the person to whom the mediation communication relates cannot be eliminated even with the subject-matter and issues of the dispute and its underlying facts and circumstances changed for the purpose of disclosure. In such a case, disclosure should simply not be made.

13. In considering whether and how a mediation communication can be effectively anonymized for disclosure for research, evaluation or educational purposes, one must also be sensitive to the timing of the proposed disclosure.

- (1) Where the disclosure is proposed to be made before the final resolution of the dispute whether by settlement or determination by the courts or arbitration (including any appeals therefrom), regard must be had to the greater risks of identification of the person to whom the mediation communication relates because of the live interest in or attention to the matter and of the consequential prejudicial effect of such identification on the resolution of the dispute.
- (2) Even where the disclosure is proposed to be made after the final resolution of the dispute:

- (A) The risk of identification of the person to whom the mediation communication relates may still exist if there is sustained public interest in or attention to the matter notwithstanding such resolution.
- (B) One should also be alert to the information about the dispute and the parties thereto that is available in the public domain, e.g. through the publication of court judgments, decisions and/or rulings. An otherwise non-identifiable mediation communication may become identifiable if read together with, or with reference to, the publicly available information about the case.

14. For the avoidance of misunderstanding, these guidelines are not, and should not be read as if they were, themselves, legislation. Nor do they purport to cover all the matters to which consideration should be given in all situations before disclosure of a mediation communication can be made under section 8(2)(e). Each case turns on its facts. Any person proposing to resort to section 8(2)(e) in making disclosure of a mediation communication should consider with care, not just the particular mediation communication and the specific research, evaluation or education for which the mediation communication is being collected, but also the person(s) to whom that mediation communication relates and all the relevant circumstances of the dispute in respect of which it arose.

Steering Committee on Mediation

May 2016