



3. Alternative Dispute Resolution (ADR).

- The Governmental Dispute Resolution Act (GDR Act) and OIEC accommodates and encourages the use of alternative dispute resolution by state governmental bodies. Furthermore, the Sunset Advisory Commission has strongly endorsed the use of Alternative Dispute Resolution in resolving appropriate disputes before governmental bodies as fairly and expeditiously as possible. OIEC's implementation of Alternative Dispute Resolution is in accordance with the GDR Act and the Texas Civil Procedures and Remedies Code.
- At any point during the complaint process, enumerated above, the parties may agree to engage in alternative dispute resolution to attempt to resolve a dispute. This process is voluntary and will only take place if both parties agree to participate with the intention of resolving the dispute. The cost incurred by the mediation shall be split equally by the complainant and OIEC.
- The Deputy Public Counsel will coordinate any alternative dispute resolution with a mediator qualified under Texas Civil Procedures and Remedies Code §154.052. Requests for alternative dispute resolution shall be made by calling (512) 804-4170 or by email at [brian.white@oiec.state.tx.us](mailto:brian.white@oiec.state.tx.us).
- If the complaint is resolved through Alternative Dispute Resolution, the Deputy Public Counsel will send a copy of the agreement to the Customer Complaint Coordinator for closure. The Customer Complaint Coordinator will gather the appropriate data concerning the effectiveness of Alternative Dispute Resolution.
- If the issue is not resolved through Alternative Dispute Resolution, the OIEC complaint process will continue. Any timeframes for completing the complaint response will be suspended during the Alternative Dispute Resolution process and will continue at the end of the Alternative Dispute Resolution process.
- At no point will Alternative Dispute Resolution be applied in a manner that denies a person a right granted under state or federal law or under a local charter, ordinance, or other similar provision, including a right to an administrative or judicial hearing. GDRA §2009-052(b).

**Data that is Collected for Internal Complaints**

1. Employee Name
  2. Date Received
  3. Date Acknowledgement Letter Sent
  4. Type of Complaint
  5. 25<sup>th</sup> Business Day
  6. Date of Response
  7. Appeal Filed
  8. Disposition
  9. \*ADR Initiated (Yes or No)
  10. \*Successful Resolution
- \*Data Fields to be added.



# OFFICE OF INJURED EMPLOYEE COUNSEL

NORMAN DARWIN, PUBLIC COUNSEL

## OIEC PROCEDURE

TITLE: Negotiated Rulemaking Procedure	NUMBER: ADMIN 11-02
	LAST REVISION DATE: June 2011

### Purpose:

To establish a negotiated rulemaking procedure.

### Responsibility:

The Public Counsel, Deputy Public Counsel/Chief of Staff, Operations Analyst, and the agency Planner are responsible for compliance of this procedure.

### Background:

During the 75<sup>th</sup> Legislative Session (1997), the Texas Negotiated Rulemaking Act was passed. The Negotiated Rulemaking Act encourages state agencies to use negotiated rulemaking and provides guidance on how the process should be used. Negotiated rulemaking was an across-the-board recommendation that the Sunset Advisory Commission recommended that the Agency implement. See House Bill 1774, Texas Regular 82<sup>nd</sup> Legislative Session.

### Definition:

Negotiated Rulemaking can be defined as a consensus-based process that agencies may use to develop proposed rule(s). This process is considered supplemental or voluntary to traditional rulemaking. A Negotiated Rulemaking Committee can be made up of agency staff and stakeholders. The Negotiated Rulemaking Committee is involved in the negotiation of issues with the goal of arriving at a unanimous consensus of the issues, and then developing a proposed rule on a specific topic. Negotiated Rulemaking is not a feasible method to develop all rules [see Texas Government Code §2008.052 (d)] and unanimous consensus cannot always be accomplished. One of the advantages of negotiated rulemaking is that stakeholder input can be “up-front” and stakeholders are involved in the process. In traditional rulemaking via Chapter 2001, Texas Government Code, stakeholder input is obtained after the rule has already been proposed.

### Guidelines for Reference:

- Texas Government Code, Chapter 2008 (Attachment A).
- Texas Government Code, Chapter 2001, Subchapter B (Attachment B).
- Texas Civil Practice and Remedies Code, Chapter 154 (Attachment C).
- Texas Negotiated Rulemaking Deskbook (Attachment D).

### Procedure:

OIEC’s Public Counsel determines that there is potential for a proposed rulemaking action utilizing negotiated rulemaking.

#### 1. Convener:



## OFFICE OF INJURED EMPLOYEE COUNSEL

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- a. The Public Counsel will appoint a "Convener" to determine if it is recommended to proceed with the negotiated rulemaking process. The Convener may be an agency employee or any other individual. The Convener must be a neutral, impartial and/or unbiased party and have no interest in the outcome of the rule (Texas Government Code §2008.052 (a-b)).
  - b. The Convener will determine if negotiated rulemaking is a feasible method to develop the proposed rule(s). A report will be provided by the Convener to Executive Management upon the completion of their review providing their recommendation (Texas Government Code §2008.052 (c-d)).
  - c. If the Convener determines that negotiated rulemaking is not appropriate traditional rulemaking may follow.
  - d. If the Convener determines negotiated rulemaking is appropriate and the Public Counsel agrees, the Operations Analyst will submit a notice of proposed negotiated rulemaking (notice) to the Secretary of State to be published in the *Texas Register* requesting comments on this initiative (Texas Government Code §2008.053 (a)(1-7) - providing for the required information to be included in the notice).
  - e. After the comments have been reviewed by the Public Counsel will determine if OIEC will proceed with negotiated rulemaking.
  - f. If negotiated rulemaking is not pursued traditional rulemaking may follow.
  - g. If it is determined that Negotiated Rulemaking will be utilized, stakeholders and OIEC staff may be appointed to the Negotiated Rulemaking Committee by the Public Counsel. There must be a balance of all affected groups to the rule (Texas Government Code §2008.054).
2. **Facilitator:**  
Next a facilitator is appointed by the Public Counsel to lead the Negotiated Rulemaking Committee (Texas Government Code §2008.055). The Facilitator can be the person who served as the Convener, an OIEC employee, or on contract with another state agency. There are specific qualifications a facilitator must possess in accordance to Texas Civil Practice and Remedies Code §§154.052 and 154.053.
3. **Negotiated Rulemaking Committee:**
- a. The Public Counsel will provide the Negotiated Rulemaking Committee a deadline for their written report. The Operations Analyst will provide appropriate administrative support to the Negotiated Rulemaking Committee.
  - b. The Facilitator and the Negotiated Rulemaking Committee begin their negotiations. Once a unanimous consensus is reached by the Negotiated Rulemaking Committee (Texas Government Code 2008.056 (b)(1-2)), the Facilitator will prepare a written report and provide it to Executive Management. The report shall include the proposed rule text (Texas Government Code §2008.056 (d)(1)).
  - c. In the event that there is not unanimous consensus of the Negotiated Rulemaking Committee Members and the Facilitator, a written report shall be provided to the Public Counsel where consensus was met, issues that remain unresolved, and any other information or recommendations the Negotiated Rulemaking Committee feels to be beneficial (Texas Government Code §2008.056 (d)(2)).
  - d. Upon approval from the Public Counsel the Operations Analyst will format the proposed rule(s) and submit the rules to the Secretary of State to be published in the *Texas Register*. A statement shall be included in the proposal stating NR was used in developing this proposed rule (Texas



## OFFICE OF INJURED EMPLOYEE COUNSEL

NORMAN DARWIN, PUBLIC COUNSEL

Government Code §2008.053 (b)(1)). The traditional rulemaking process in accordance to Texas Government Code Chapter 2001 will apply subsequent to the proposed rule submission to the Secretary of State.

- e. Upon adoption of the proposed rule unless an earlier date is agreed upon, the NR committee will automatically abolish (Texas Government Code §2008.054 (b)).

#### 4. **Confidentiality of Certain Records and Communications:**

(Texas Government Code §2008.057)

- a. Civil Practice and Remedies Code §§154.053 and 154.073 apply to the communications, records, conduct, and demeanor of the Facilitator and the members of the Negotiated Rulemaking Committee as if the negotiated rulemaking were a dispute being resolved in accordance with Chapter 154, Civil Practice and Remedies Code.
- b. In the negotiated rulemaking context the Attorney General, subject to review by a Travis County district court, decides in accordance with Section 154.073(d), Civil Practice and Remedies Code, §154.073 (d) whether a communication or material is confidential, excepted from required disclosure, or subject to required disclosure.
- c. Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:
  - a private communication and a record of a private communication between a facilitator and a member or members of the committee are confidential and may not be disclosed unless the member or members of the committee, as appropriate, consent to the disclosure; and
  - the notes of a facilitator are confidential except to the extent that the notes consist of a record of a communication with a member of the committee who has consented to disclosure in accordance with Subdivision (1).
  - The report and recommendations of a convener and a negotiating committee are public information and available on request to any member of the public.

#### 5. **Training of Staff:**

It is advised that any OIEC staff that are participating in any on-going negotiated rulemaking attend training that is provided by the University of Texas, Center of Public Policy Dispute Resolution in Austin, Texas or other appropriate training venues as determined by the Public Counsel.

The Public Counsel will be responsible for training the Negotiated Rulemaking Committee. The Public Counsel may delegate this task to the Facilitator or anyone they see fit to effectively provide the training. The Guidelines Referenced at the beginning of this document should be provided to all members of the Negotiated Rulemaking Committee at the beginning of the negotiated rulemaking process.

#### 6. **Collecting Data on the Effectiveness of Negotiated Rulemaking:**

The Operations Analyst in coordination with the agency's Planner for OIEC will develop an evaluation to measure the effectiveness and the outcome of all negotiated rulemaking initiatives. In addition, the Planner will be responsible for collecting, evaluating, and analyzing the data and providing a report to the Public Counsel.