

CONFIDENTIALITY & NON-DISCLOSURE AGREEMENT

NEW YORK STATE OFFICE OF MENTAL HEALTH (OMH)

OMH Ref

I. PURPOSE OF THE AGREEMENT

The New York State Office of Mental Health (OMH) desires to disclose, and Receiving Entity desires to receive, access to computer information services, and/or certain confidential information or data necessary to fulfill the obligations of their current business relationship. In addition to statutory requirements to which it is bound, it is standing policy of the OMH to safeguard and take specific steps necessary to ensure the confidentiality and integrity of certain information, including but not limited to that information which is protected under state or federal law (e.g., individually identifiable patient information) and/or accreditation requirements.

II. DEFINITION OF TERMS

The terms identified below, as used throughout this Agreement, shall refer to the following:

(1) **"Information Assets"**: includes, without limitation, data, know-how, formulae, techniques, compositions, methods, processes, concepts, ideas, inventions, equipment, trade secrets, research, discoveries, designs, sketches, photographs, graphs, drawings, product specifications, customer lists, survey instruments, assessment tools, market studies, financial data, business plans, databases, systems, architectures, notes, analyses, compilations, summaries, personal information related to personnel, users, customers or suppliers, and any other data prepared by or on behalf of OMH. OMH categorizes its Information Assets by utilizing the following status classifications:

- (A) **"PHI (Protected Health Information)"**: An OMH Information Assets classification status that includes any records that relate to past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care that can be directly or indirectly attributed to an individual.
- (B) **"Restricted"**: An OMH Information Assets classification status that includes the most sensitive information and which is made available on a very limited basis.
- (C) **"Internal"**: An OMH Information Assets classification status that includes information intended only for use by the OMH workforce and other authorized personnel when conducting agency business.
- (D) **"Public"**: An OMH Information Assets classification status that includes information that has been appropriately made available for public distribution through public channels.

(2) **"OMH System(s)"**: includes, but is not limited to, software, desktop computers, laptops, computer networks, access to e-mail systems, any type of OMH supplied or reimbursed accounts (e.g., access to the Internet or remote systems), facsimile, telephone, and voice mail, whether OMH owned, leased or sponsored.

(3) **"Workforce"**: means employees, volunteers, trainees and other persons whose conduct, in the performance of work for a party to this Agreement, is under the direct control of such party, whether or not they are paid by such party.

III. SUBJECT OF AGREEMENT

III.1. This Agreement applies to the disclosure and receipt of "Confidential Information" provided and/or exchanged for the purpose(s) identified as the "Purpose and Nature of Work" in the accompanying Computer Application Sharing Agreement (CASA) and/or Data Exchange Agreement (DEA), as applicable, which terms shall be incorporated into this Agreement.

III.2. For purposes of this Agreement, the term "Confidential Information" shall include: (1) Information Assets that have a classification status, as identified by OMH, as "PHI", "Restricted", or "Internal" (as described in Section II of this Agreement) and

(2) all OMH Systems.

Subject to the exceptions set forth in paragraph III.3 below, Confidential Information also includes, without limitation, information of a similar nature received by OMH from third parties which OMH is obligated to treat as confidential, and information in combination with publicly known information where the nature of the combination is not publicly known.

III. 3. For purposes of this Agreement, Confidential Information shall not include Information Assets that have a classification status of "Public," or information to the extent to which Receiving Entity can establish by legally sufficient evidence that such information:

- (1) was rightfully and lawfully in Receiving Entity's possession before receipt from OMH, provided, however, that this exception shall not apply to information regarding patients of facilities directly operated by OMH; or
- (2) is rightfully received by Receiving Entity from a third party on a non-confidential basis, provided such party had a right to possess and distribute such information; or
- (3) is or was independently developed by or for Receiving Entity; or
- (4) that becomes generally available to the public without improper disclosure.

III.4. This Agreement addresses all Confidential Information, regardless of the form or format, in which it is created or used in support of OMH business, including without limitation, spoken communication, written documentation, computer databases or transmissions, tapes, diskettes, computer generated reports, e-mail messages, voice mail messages, facsimiles, meeting minutes and working papers.

IV. RESTRICTIONS ON USE AND NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

IV.1. Except as expressly permitted in writing by an authorized representative of OMH or unless required by law, regulation, or legal process or by the rules of any securities exchange, Receiving Entity agrees that it shall not:

- (1) use the Confidential Information for any purpose other than the one for which OMH shared such information, as identified by Receiving Entity in the DEA and/or the CASA; and
- (2) directly or indirectly copy, transfer, or otherwise disclose or reveal Confidential Information to any person or entity other than its workforce, directors, officers, agents or consultants who:
 - (A) has a demonstrable "need to know" such information in connection with the OMH and Receiving Entity's business relationship and/or discussions; and
 - (B) has been advised in writing and have signed acknowledgment, via the DEA and/or CASA, as applicable, and any properly executed riders thereto, of the information's classification status; and
 - (C) is subject to legally binding obligations of confidentiality as set forth in this Agreement, provided however, that Receiving Entity shall at all times be fully responsible to OMH for the compliance by such persons with this Agreement; and/or
- (3) announce or disclose to any third party its participation in the business relationship between OMH and Receiving Entity to the extent the Confidential Information concerns any unannounced products, technology, services, or business transactions.

IV.2. (1) To the extent that Information Assets obtained by Receiving Entity contain data with an OMH classification status of "PHI," by signing this Agreement, Receiving Entity hereby represents that it

understands New York State and Federal laws and regulations on confidentiality of medical records and other individually identifiable health information and shall ensure that its workforce who may come in contact with such data is properly trained in the handling of medical records and other individually identifiable health information under New York State and Federal laws and regulations.

(2) To the extent that Information Assets obtained by Receiving Entity contain data with an OMH classification status of "PHI," and such Information Assets constitute a "limited data set" as defined in 45 C.F.R. Section 164.514(e), by signing this Agreement, Receiving Entity hereby represents that it shall not attempt to identify or contact the individual to whom the limited data set applies.

V. STANDARD OF CARE

V.1. Receiving Entity shall use at least the same degree (but no less than a reasonable degree) of care and protection to prevent the unauthorized use, dissemination, tampering, or copying of any Confidential Information as Receiving Entity uses to protect its own Confidential Information. OMH has Policy and Standards to support the use and disclosure of each of the information classifications. If in doubt regarding the standard of care to be applied, the Receiving Entity can apply these to form the basis of their use and disclosure of OMH information assets.

V.2. Receiving Entity agrees to routine, unannounced inspections by the OMH, through its Information Security Office, to ensure the level of protection is maintained. To the extent practical and possible, such unannounced inspections shall occur during the normal business hours of Receiving Entity.

V.3. In the event of unauthorized access to Confidential Information, the Receiving Entity shall provide any and all assistance required by OMH to prevent further unauthorized access and to cooperate with OMH to secure the Confidential Information and protect OMH's proprietary rights.

VI. REPORTING OF UNAUTHORIZED DISCLOSURES AND OTHER INFORMATION SECURITY BREACHES

Any accidental or deliberate unauthorized disclosure of Confidential Information, information security breach, or suspicion of same, shall be immediately reported by Receiving Entity to the OMH Information Security Officer. The Receiving Entity shall maintain a written record of all such incidents.

VII. RECORD MAINTENANCE AND RETENTION

VII.1. Receiving Entity agrees to keep sufficiently descriptive and accurate records of data disclosures made under this Agreement, which shall identify the parties and the date of the DEA and/or CASA, as applicable, under which the data is disclosed.

VII.2. For each distinct purpose for which Receiving Entity wishes to obtain Confidential Information and/or access OMH Systems, a separate and distinct DEA and/or CASA, as applicable, shall be executed, which shall be made a part of and incorporated within this Agreement. If Receiving Entity wishes to obtain additional data or access to additional OMH Systems for the identical purpose as previously identified as the Purpose and Nature of Work in the original DEA and/or CASA, the original DEA and/or CASA may be amended upon mutual agreement of both parties to this Agreement. Once fully executed, the original copy of this Agreement and a copy of each DEA and/or CASA, or amended DEA and/or CASA, as applicable, shall be furnished to the OMH Information Security Officer for retention.

VIII. OWNERSHIP, INTELLECTUAL PROPERTY AND COPYRIGHT

VIII.1. It is a presumption that OMH retains full copyright and intellectual property rights over all its Information Assets and OMH Systems, wherever they may be stored.

VIII.2. OMH has legal ownership of the contents of all files stored on its OMH Systems as well as all messages transmitted via these systems. OMH reserves the right to access this information without prior notice whenever there is a genuine business need. Any use of OMH Systems requires OMH management approval and is subject to periodic and random monitoring by OMH. In the event of a suspected security breach, or inappropriate use of OMH resources, OMH retains the right to revoke access.

VIII.3. Nothing contained herein shall limit the right of OMH or Receiving Entity to:

- (1) independently develop, procure, use and/or market similar or competitive products or services; or
- (2) use ideas, concepts or techniques which were previously used, developed, or known by it, provided that such activity does not violate any other legal rights of the other party to this Agreement.

VIII.4. Receiving Entity agrees not to assert any claim of title or ownership to the Confidential Information or any portion thereof. If Confidential Information consists of computer software disclosed in object code form, Receiving Entity shall not, and shall not permit any other party to, reverse engineer, reverse compile, or disassemble such object code, or take any other steps to derive a source code equivalent thereof. No Confidential Information obtained from OMH shall be merged with other files created by, in the possession of, or obtained by Receiving Entity unless Receiving Entity has provided OMH with a detailed written request and has received approval from OMH to do so. No findings, reports or research documents may be published using Confidential Information without the prior written approval of OMH.

IX. DISCLOSURES REQUIRED BY LAW

In the event Receiving Entity becomes legally compelled to disclose any Confidential Information, Receiving Entity shall immediately notify OMH and shall further provide prompt written notice of same in such a manner as to enable OMH to timely seek an appropriate legal remedy. If such remedy is not obtained, or if OMH waives in writing compliance with the provisions of this paragraph, Receiving Entity agrees to furnish only that portion of the information which Receiving Entity is advised by its Counsel, after consultation with OMH Counsel, is legally required and to exercise its best efforts to ensure continued confidential treatment of such information.

X. CONFIDENTIALITY PERIOD

X.1. Receiving Entity's obligations under this Agreement as to any Confidential Information will expire on the earlier of:

- (1) the sixth anniversary of the date of disclosure of such information; or
- (2) the entry by OMH and Receiving Entity into a separate, subsequent agreement that contains confidentiality and non-disclosure provisions which supersede this Agreement as to that Confidential Information.

X.2. The period of confidentiality for data or other material that contains information that directly identifies a consumer of mental health services that are/were provided in the State of New York will remain in perpetuity or until such time as the data is either returned to OMH or destroyed with the prior written approval of OMH and subsequent verification thereof by Receiving Entity.

XI. LIMITATIONS AND WARRANTIES

OMH represents that it has the right to make the disclosures under this Agreement. Otherwise, OMH makes no representations or warranties, express or implied, as to the quality, accuracy and completeness of the information disclosed hereunder. OMH will not be responsible for any loss resulting from any of these Agreements.

XII. DISPOSAL OF CONFIDENTIAL INFORMATION

XII.1. Receiving Entity agrees to destroy or return to OMH all copies of Confidential Information promptly upon the earlier of:

- (1) OMH's request at any time; or
- (2) expiration of the confidentiality period, unless both OMH and Receiving Entity expressly agree otherwise in writing.

XII.2. This disposal of Confidential Information includes the return of all access control hardware, software, authentication devices (including but not limited to tokens, access cards, and biometric devices) to the OMH Information Security Officer immediately upon notification of termination of this Agreement by either OMH or Receiving Entity. Actual destruction of Confidential Information itself may be completed by the Receiving Entity with prior written approval of OMH and written certification of completion by Receiving Entity.

XIII. REMEDIES

Receiving Entity acknowledges and agrees that a breach of this Agreement may cause continuing and irreparable injury to OMH as a direct result of any such violation, for which the remedies at law may be inadequate, and that OMH shall therefore be entitled, in the event of any actual or threatened violation of this Agreement by Receiving Entity, and in addition to any other remedies available to it, to seek a temporary restraining order and injunctive relief against the Receiving Entity or any other party to this Agreement to prevent any violations thereof, and to any other appropriate equitable relief.

XIV. INDEMNIFICATION

Receiving Entity (except New York State agencies) agrees to indemnify and hold harmless the People of the State of New York, its officers and employees, OMH and its officers and employees, against all claims, suits, actions, liabilities, losses, costs, damages or expenses and costs of every description including reasonable attorney's fees and other expenses of litigation arising out of this Agreement, provided, however, that if Receiving Entity is a local government, as defined in Section 41.03 of the New York State Mental Hygiene Law, it shall so indemnify and hold harmless the People of the State of New York, its officers and employees, OMH and its officers and employees as and to the extent permitted by law. OMH agrees to indemnify and hold harmless Receiving Entity only for those actions proximately caused by OMH's own negligence to the extent permitted by law.

XV. MODIFICATIONS TO THIS AGREEMENT

All modifications to this Agreement must be submitted in writing to and approved by OMH. Receiving Entity agrees that this Agreement may be amended from time to time by OMH if and to the extent required by the provisions of 42 U.S.C. §1171 *et seq.* enacted by the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder, in order to assure that this Agreement is consistent therewith.

XVI. SEVERABILITY

Any provision of this Agreement that a court of competent jurisdiction determines to be unenforceable will be ineffective to the extent of such determination without invalidating the remaining provisions of this Agreement or affecting the validity or enforceability of this Agreement.

XVII. CONTINUING VALIDITY OF TERMS

No failure or delay by OMH in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power, or privilege hereunder.

XVIII. GOVERNING LAW

XVIII.1. This Agreement shall be governed by the laws of the state of New York, including but not limited to New York State Mental Hygiene Law Sections 33.13 and 33.16, without regard to conflicts of laws principles. For the purposes of this Agreement, and with respect to such information that may be made available to or obtained by Receiving Entity under this Agreement and corresponding DEA(s) or CASA(s), Receiving Entity hereby agrees to be bound by the provisions of 42 U.S.C. §1171 *et seq.* enacted by the Health Insurance Portability and Accountability Act of 1996 and regulations promulgated thereunder which require appropriate safeguards be employed to protect the confidentiality of individually identifiable health information. In amplification and not in

limitation of the provisions of this Agreement, including this paragraph of the Agreement, Receiving Entity further agrees that it will:

- (1) not use or further disclose individually identifiable health information other than is permitted or required by this Agreement;
- (2) not use or further disclose individually identifiable health information in a manner that would violate the requirements of applicable law, if done by OMH;
- (3) report to OMH any use or disclosure of individually identifiable health information not provided for by this Agreement of which Receiving Entity becomes aware;
- (4) ensure that any subcontractors or agents to whom Receiving Entity provides individually identifiable health information received from OMH agree to the same restrictions and conditions that apply to Receiving Entity with respect to such information; and
- (5) upon termination of this Agreement, return or destroy all individually identifiable health information received from OMH that Receiving Entity still maintains in any form and retain no copies of such information.

XVIII.2. Confidential Information disclosed under this Agreement may contain Medicare or Medicaid information. To the extent applicable, Receiving Entity will comply with the requirements of 42 U.S.C. §1395x *et seq.* with regard to this information, to the extent that OMH is required to comply with such requirements.

XIX. SPECIAL PROVISIONS FOR AIDS/HIV RELATED INFORMATION

Confidential Information disclosed under this Agreement may contain AIDS/HIV related information as defined in Section 2780 of the New York Public Health Law. As required by New York Public Health Law Section 2782, Receiving Entity agrees to include the following notice in any contract, agreement, or other document the Receiving Entity enters into that contains individual identifying AIDS/HIV related information obtained from OMH under this Agreement: "This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is not sufficient authorization for the release for further disclosure."

XX. EFFECTIVE DATE

Unless otherwise agreed to by the parties and indicated below, the effective date of this Agreement shall be the date upon which OMH signs the Agreement.

XXI. TERMINATION

Without limiting the rights and remedies of OMH set forth elsewhere in this Agreement or available under applicable law, OMH may terminate this Agreement without penalty or recourse to OMH if OMH determines that Receiving Entity has violated a material term of the provisions of this Agreement.