

Supplement 3

Ohio Department of Health Data Sharing and Confidentiality Agreement

Ohio Department of Health Data Sharing and Confidentiality Agreement

1. Purpose and Legal Authority

This Agreement is entered into by Ohio Department of Health (ODH) and Contractor (identified below), in accordance with the terms and conditions of the underlying Department of Administrative Services (DAS) Contract that require the use or disclosure of protected health information.

The authority to release this data is found in Ohio law and the terms of this Agreement.

The parties agree that any data or records provided under this Agreement may only be used or disclosed in accordance with applicable Ohio law as interpreted and directed by ODH.

2. Description of Records to be Provided to or Accessed by Contractor

Contractor shall have the minimal amount of access to records, data, reports, databases, and/or other derivative documents necessary to perform the work required under the DAS Contract.

3. Confidentiality of Information

- 3.1. Contractor agrees that it shall not use any information, systems, or records made available to it for any purpose other than to fulfill the obligations specified herein. Contractor specifically agrees to comply with state and federal confidentiality and information disclosure laws, rules, and regulations applicable to programs under which this Agreement exists, including, but not limited to:
 - United States Code, 42 USC 1320d through 1320d-8 (HIPAA);
 - Code of Federal Regulations, 42 CFR 431.300, 431.302, 431.305, 431.306, 435.945, 45 CFR 164.502(e), 164.504(e), and 162.100;
 - Ohio Revised Code, ORC 173.20, 173.22, 2305.24, 2305.251, 3701.17, 3701.243, 3701.028, 4123.27, 5101.26, 5101.27, 5160.39, 5168.13, and 5165.88; and
 - Corresponding Ohio Administrative Code rules.
- 3.2. Contractor agrees that any data created, received, maintained or transmitted on behalf of ODH by Contractor shall be returned to ODH not later than 90 calendar days following termination of this Agreement and shall certify that no copies of source data were retained by Contractor, unless as may be otherwise provided for in this Agreement or by law. Contractor shall notify ODH and describe all data retained regardless of the basis for retention.
- 3.3. Contractor shall implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of all data and health information that it creates, receives, maintains, or transmits on behalf of ODH against use or disclosure not provided for by this Agreement.
- 3.4. Contractor agrees that access to the records and data provided by ODH and described in ARTICLE 2 will be restricted to only those authorized employees, officials, subcontractors, and other persons who need it to perform duties related to this Agreement. Contractor agrees to provide the ODH Agreement Manager with a complete listing of any and all such persons who shall have access to the above referenced

records and/or data. Contractor agrees no access shall be granted unless and until the ODH Agreement Manager notifies the Contractor of having received, reviewed, and agreed to the proposed access list.

- 3.5. Contractor agrees that the above records and/or data and any records, reports, databases, and/or other derivative documents created under this Agreement shall be stored in an area that is physically safe from access from unauthorized persons during duty and non-duty hours. All records, data, reports, databases, and/or other derivative documents provided or created under this Agreement shall be protected electronically to prevent unauthorized access by computer, remote access, or any other means. Contractor expressly agrees that no records, data, reports, databases, and/or other derivative documents will be accessed, tested, maintained, backed up, or stored outside of the United States.
- 3.6. Contractor shall assure that all persons who have access to the above referenced records, data, reports, databases, and/or other derivative documents shall be fully apprised as to the confidential nature of the information, the safeguards required to protect the same, and the applicable civil and criminal sanctions and penalties associated with any intentional or non-intentional disclosure. No subcontractor shall receive any records, data, reports, databases, and/or other derivative documents without a written agreement with Contractor incorporating these assurances.
- 3.7. Contractor shall not disclose any of the above referenced records, data, reports, databases, and/or other derivative documents to any third party without the specific written authorization of the Director of ODH.
- 3.8. Contractor shall permit onsite inspection by the State of Ohio (including but not limited to ODH, the Auditor of the State of Ohio, the Inspector General of Ohio, the Ohio Attorney General or any duly authorized law enforcement officials) and by agencies of the United States government.
- 3.9. ODH will prepare data pursuant to the security and encryption standards found in Ohio IT Standard ITS-SEC-01, Data Encryption and Cryptography; and NIST Special Publication 800-53. Contractor shall retain this encryption while the data is in transit or at rest. Contractor will ensure information subject to the laws listed in Section 3701-75-04 of the Ohio Administrative Code, which is considered Confidential Personal Information (CPI), and included in a "system" (as defined in ORC 1347.15(A)(1)) complies with the logging requirements of ORC 1347.15(B)(4)(a). Contractor will ensure all systems/products procured by the ODH as part of this Agreement meet the State of Ohio's 12-character password requirement. The password requirements include, but are not limited to, a combination of at least 12 alpha numeric (upper and lower case, and numbers), and special characters (ex., \$, &, %, #), as well as password validity from 60 to 90 days; and locking accounts after a set number of unsuccessful login attempts.
- 3.10. The express terms and conditions of this Article shall be included in all subcontracts executed by Contractor for any and all work under this Agreement.

4. Time of Performance

- 4.1. This Agreement shall be in effect upon execution by the Director of ODH, until the DAS Contract is terminated, unless this Agreement is suspended or terminated pursuant to ARTICLE 6 prior to the termination date.
- 4.2. The Confidentiality and Business Associate provisions of this Agreement shall survive the termination of this Agreement and shall do so for the foreseeable future without further consideration.

5. Cost of Data Preparation

The parties agree that no reimbursement will be sought under the terms of this Agreement.

6. Suspension and Termination

- 6.1. Upon 30 calendar days written notice to the other party, either party may terminate this Agreement.
- 6.2. Notwithstanding Section 6.1 of this Article, ODH may suspend or terminate this Agreement immediately upon delivery of written notice to Contractor, if ODH discovers any illegal conduct on the part of Contractor or if there is any breach of the confidentiality provisions of ARTICLE 3 or ARTICLE 11 herein.
- 6.3. Notice of termination or suspension under either Section A or B of this Article must be sent to: the ODH Chief Legal Counsel, 246 North High Street, Columbus, OH 43215 and to Supplier's representative at the address appearing on the signature page of this Agreement.

7. Breach or Default

- 7.1. Upon breach or default of any of the provisions, obligations or duties embodied in this Agreement, ODH may exercise any administrative, contractual, equitable, or legal remedies available, without limitation. The waiver of any occurrence of breach or default is not a waiver of subsequent occurrences, and ODH retains the right to exercise all remedies hereinabove mentioned.
- 7.2. If either of the parties fails to perform an obligation or obligations under this Agreement and thereafter such failure(s) is (are) waived by the other party, such waiver shall be limited to the particular failure(s) so waived and shall not be deemed to waive other failure(s) hereunder. Waiver by ODH shall not be effective unless it is in writing signed by the ODH Director.

8. Amendments

This Agreement may be modified or amended provided that any such modification or amendment is in writing and is signed by the Director of ODH and Contractor. It is agreed, however, that any amendments to laws, rules, or regulations cited herein will result in the correlative modification of this Agreement, without the necessity for executing a written amendment.

9. Independent Contractor

Contractor agrees that no agency, employment, joint venture, or partnership has been or will be created between the parties hereto pursuant to the terms and conditions of this Agreement. Contractor also agrees that, as an independent contractor, it assumes all responsibility for any federal, state, municipal, or other tax liabilities along with workers compensation, unemployment compensation, and insurance premiums which may accrue as a result of compensation received for services or deliverables rendered hereunder. Contractor agrees that it is an independent contractor for all purposes including, but not limited to, the application of the Fair Labor Standards Act, the Social Security Act, the Federal Unemployment Tax Act, the Federal Insurance Contribution Act, provisions of the Internal Revenue Code, Ohio Tax law, Workers Compensation law, and Unemployment Insurance law. Contractor certifies that all approvals, licenses, or other qualifications necessary to conduct business in Ohio have been obtained and are operative. If at any time during the contractual period Contractor becomes disqualified from conducting business in Ohio, for whatever reason, Contractor must immediately notify ODH of the disqualification and will immediately cease performance of its obligations hereunder.

10. Limitation of Liability

To the extent allowable by law, Contractor agrees to defend, indemnify and hold ODH, its officials, employees and agents harmless from and against any and all liability, loss and expense (including reasonable attorneys' fees) or claims for personal injury, property damage, patent and copyright infringement, or for any liability or claims under ARTICLE 11, Business Associate Requirements Under HIPAA, below, and/or any other type of claim that arises from the

performance under this Agreement. Contractor's sole and exclusive remedy for any ODH failure to perform under this Agreement will be an action in the Ohio Court of Claims pursuant to ORC Chapter 2743 that will be subject to the limitations set forth in this Article. In no event will ODH be liable for any indirect or consequential damages, including loss of profits, even if ODH knew or should have known of the possibility of such damages. To the extent that ODH is a party to any litigation arising out of or relating in any way to this Agreement or the performance thereunder, such an action shall be brought only in a court of competent jurisdiction in Franklin County, Ohio. Subject to ORC 109.02, Contractor agrees to defend ODH against any such claims or legal actions if called upon by ODH to do so.

11. Data Management Requirement

- 11.1. The definitions contained in this Section are derived from federal law. Should there be any conflict between the meanings assigned in this Agreement and the meanings defined in applicable federal law (even in the event of future amendments to law that create such conflict), the definitions found in federal law will prevail.
 - 11.1.1. General Definitions. The following terms used in this Agreement shall have the same meaning as those terms in the HIPAA Rules: Breach, Data Aggregation, Designated Record Set, Disclosure, Health Care Operations, Individual, Minimum Necessary, Notice of Privacy Practices, Required by Law, Secretary, Security Incident, Subcontractor, Unsecured Protected Health Information and Use.
 - 11.1.2. Specific Definitions.
 - 11.1.2.1. HIPAA means the Health Insurance Portability and Accountability Act of 1996, the American Recovery and Reinvestment Act of 2009 (ARRA) and any other applicable federal statute or regulation.
 - 11.1.2.2. HIPAA Rules shall mean the Privacy, Security, Breach Notification, and Enforcement Rules at 45 CFR Part 160 and Part 164.
 - 11.1.2.3. Covered Entity means a health plan, a health care clearinghouse, or health care provider under 45 CFR 160.103.
 - 11.1.2.4. Business Associate means a person or entity that, on behalf of the Covered Entity, maintains, performs, or assists in the performance of a function or activity that involves the use or disclosure of "Protected Health Information" under 45 CFR 160.103.
 - 11.1.2.5. Protected Health Information (PHI) means individually identifiable information including but not limited to the past, present or future physical or mental health or condition of an individual, provision of health care to an individual, or the past, present or future payment for health care provided to an individual, as more fully defined under 45 CFR 164.501 and any amendments thereto, received or sent on behalf of the ODH. PHI is further defined to include information that could be used to reveal the identity of the individual who is the subject of the information, either by using the information alone or with other information that is available to predictable recipients of the information as set forth by R.C. 3701.17(A)(2).
- 11.2. Contractor, in carrying out the work described in this Agreement, agrees to comply with all of the following provisions:
 - 11.2.1. Permitted Uses and Disclosures. Contractor will not use or disclose PHI except as provided in this Agreement or as otherwise required under HIPAA regulations or other applicable law.
 - 11.2.2. Safeguards. Contractor will implement sufficient safeguards and comply with Subpart C of 45 CFR Part 164 pertaining to electronic PHI to prevent the use or disclosure of PHI other than as provided for under this Agreement. Safeguards will be implemented for all paper and electronic PHI created, received, maintained, or transmitted on behalf of ODH.
 - 11.2.3. Reporting of Disclosures. Contractor agrees to promptly report to ODH any inappropriate use or disclosure of PHI that is not in accordance with this Agreement or applicable law, including

breaches of unsecured protected health information as required at 45 CFR 164.410 and any security incident the Contractor has knowledge of or reasonably should have knowledge of under the circumstances. Reporting and other communications made to ODH under this Article must be made to the agency's HIPAA privacy officer at:

Ohio Department of Health
Office of General Counsel
Privacy Officer
246 N. High Street
Columbus, Ohio 43215
Main: 614-466-4882
Email: Socrates.Tuch@odh.ohio.gov

- 11.2.4. Mitigation Procedures. Contractor agrees to coordinate with ODH to determine specific actions that will be required of the Business Associates for mitigation, to the extent practical, of the breach. These actions will include notification to the appropriate individuals, entities, or other authorities. Notification or communication to any media outlet must be approved, in writing, by ODH prior to any such communication being released. Contractor will report all of its mitigation activity to ODH and shall preserve all relevant records and evidence.
- 11.2.5. Incidental Costs. Contractor shall bear the sole expense of all costs to mitigate any harmful effect, of any breaches or security incidents of which Contractor has knowledge which are directly caused by the use or disclosure of protected health information by Contractor in violation of the terms of this Agreement. These costs will include, but are not limited to, the cost of investigation, remediation and assistance to the affected individuals, entities or other authorities.
- 11.2.6. Agents and Subcontractors. Contractor, in compliance with 45 CFR 164.502(e)(1)(ii) and 164.308(b)(2) as applicable, will ensure that all its agents and subcontractors that create, receive, maintain, or transmit PHI from or on behalf of Contractor and/or ODH agree to have, in a written agreement, the same restrictions, conditions, and requirements that apply to Contractor with respect to the use or disclosure of PHI.
- 11.2.7. Accessibility of Information. Contractor will make available to ODH such information as ODH may require to meet its obligations to provide access to, provide a copy of any information or documents with respect to PHI, pursuant to any applicable law.
- 11.2.8. Amendment of Information. Contractor shall make any amendment(s) to PHI as directed by, or agreed to, by ODH or take other steps as necessary to satisfy ODH's obligations. In the event that Contractor receives a request for amendment directly from the individual, agent, or subcontractor, Contractor will notify ODH prior to making any such amendment(s). Contractor's authority to amend information is explicitly limited to information created by Contractor.
- 11.2.9. Accounting for Disclosure. Contractor shall maintain and make available to ODH or individuals requesting the information as appropriate, records of all disclosures of PHI in a Designated Record Set as necessary to satisfy ODH's obligations. For every disclosure the record will include, at a minimum, the name of the individual who is the subject of the disclosure, the date of the disclosure, reason for the disclosure if any, and the name and address of the recipient to which the protected health information was disclosed.
- 11.2.10. Obligations of ODH. When Contractor is to carry out an obligation of ODH, Contractor agrees to comply with all applicable requirements of Subpart E of 45 CFR 164 in the performance of such obligation.
- 11.2.11. Access to Books and Records. Contractor shall make available to ODH and to the Secretary of the U.S. Department of Health and Human Services any and all internal practices, documentation, books, and records related to the use and disclosure of PHI received from ODH or created or received on behalf of ODH.

- 11.2.12. **Material Breach.** In the event of material breach of Contractor's obligations under this Article, ODH may immediately terminate this Agreement as set forth in ARTICLE 6, Section 6.2. Termination of this Agreement will not affect any provision of this Agreement, which, by its wording or its nature, is intended to remain effective and to continue to operate after termination.
- 11.2.13. **Return or Destruction of Information.** Upon termination of this Agreement and at the request of ODH, Contractor will return to ODH or destroy all PHI in Contractor's possession stemming from this Agreement as soon as possible but no later than 90 days and will not keep copies of the PHI except as may be requested by ODH or required by law, or as otherwise allowed for under this Agreement. If Contractor, its agent(s), or subcontractor(s) destroy any PHI, then Contractor will provide to ODH documentation evidencing such destruction. Any PHI retained by Contractor will continue to be extended the same protections set forth in this Section, HIPAA regulations and this Agreement for as long as it is maintained.
- 11.2.14. **Survival.** These provisions in this Article shall survive the termination of this Agreement.

12. Counterpart

This Agreement may be executed in one, or more than one counterpart, and each executed counterpart shall be considered an original, provided that such counterpart is delivered to the other party by facsimile, mail courier or electronic mail, all of which together shall constitute one and the same agreement.

13. Construction

This Agreement shall be governed, construed, and enforced in accordance with the laws of the State of Ohio. Should any portion of this Agreement be found to be unenforceable by operation of statute or by administrative or judicial decision, the operation of the balance of this Agreement is not affected thereby; provided, however, the absence of the illegal provision does not render the performance of the remainder of this Agreement impossible.

14. Notice

Notwithstanding Section 6.3 and Article 11 of this Agreement, any notice or other communication to the other party pursuant to this Agreement shall be deemed provided if in writing and sent to the appropriate contact provided in the applicable DAS Contract or such address designated in writing by the party.

*SIGNATURE PAGE FOLLOWS
REMAINDER OF PAGE LEFT INTENTIONALLY BLANK*

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date of signature of the Director of the Ohio Department of Health.

CONTRACTOR

OHIO DEPARTMENT OF HEALTH

Print full Contractor Name

Signature in blue ink

Print Name and Title

Date

Signature in blue ink

Print Name and Title

Date