

# **NHS Confidentiality agreement**

**with guidance notes for staff**

**August 2007**

# **NHS Confidentiality Agreement**

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## NHS Confidentiality agreement

**THIS AGREEMENT** is made this \_\_\_\_\_ day of \_\_\_\_\_ 200\_

### **BETWEEN**

(1) \_\_\_\_\_ of \_\_\_\_\_

(referred to in clause 5 of this Agreement as the “**Authority**”); and

(2) \_\_\_\_\_ of \_\_\_\_\_

### **Background**

The parties intend to enter into discussions and/or evaluations relating to the Purpose described in the Schedule. During the course of those discussions and/or evaluations they may each disclose Confidential Information (as defined below) to the other. The parties wish to protect their confidential and proprietary information and that of their suppliers, customers and other persons to whom they owe a duty of confidence.

**IT IS AGREED** as follows:

1. In this Agreement:

**[Select one of the following definitions, and delete the other one – see guidance notes]**

**[Wide definition]** “**Confidential Information**” means any commercial, technical, financial or other information, of whatever nature and in whatever form, of either party, including information relating to any suppliers or customers of the parties, disclosed or supplied by either party to the other (whether before or after the date of this Agreement) or which directly or indirectly comes to the attention of the other party, whether or not marked as “Confidential”, “Proprietary” or otherwise;

**[Standard definition]** “**Confidential Information**” means any commercial, technical, financial or other information, of whatever nature and in whatever form, of either party which relates to the Purpose, including information relating to any suppliers or customers of the parties, disclosed or supplied by either party to the other (whether before or after the date of this Agreement), whether or not marked as “Confidential”, “Proprietary” or otherwise;

“**Purpose**” means the purpose described in the Schedule;

2. The parties have agreed to disclose Confidential Information to each other under the terms of this Agreement. For the period of this Agreement as set out in the Schedule each of the parties agrees:

(a) to treat all Confidential Information of the other party as secret and confidential;

- (b) not without the prior written consent of the other party to disclose any Confidential Information of the other party or permit the same to be disclosed to any person except as permitted by this Agreement;
  - (c) only to copy the Confidential Information of the other party to the extent strictly required for the Purpose or for disclosures permitted by this Agreement and to mark all copies made as “Confidential and Proprietary” to the other party; and
  - (d) not to use the Confidential Information of the other party or permit the same to be used for its own purposes or for any purpose other than the Purpose.
3. The restrictions set out in clause 2 shall not apply to any Confidential Information which:
- (a) was already known to or in the possession of the receiving party at the time it was disclosed to it and was free from any obligation of confidence or any other restriction as to use or disclosure;
  - (b) was lawfully and without any restriction as to its use or disclosure subsequently disclosed to the receiving party by a third party;
  - (c) was in the public domain prior to its disclosure to the receiving party or subsequently came to be in the public domain after its disclosure to the receiving party, other than by reason of any breach of a duty of confidentiality owed by the receiving party; or
  - (d) is disclosed pursuant to applicable laws, regulations or a court order.
4. Either party may disclose any Confidential Information of the other to such of its officers, employees, agents or sub-contractors whose participation in the Purpose is essential and to its professional advisers and consultants engaged in connection with the Purpose who, in each case, are informed of the confidential nature of the information. The receiving party shall take reasonable steps to require such persons to preserve the confidentiality of any information so disclosed and shall in any event remain fully liable to the disclosing party for any breach by such person of the terms of this Agreement.
5. Without prejudice to clause 3 (d) above, the parties acknowledge and agree that, as a public authority, the Authority has a statutory obligation to comply with the provisions of the Freedom of Information Act 2000 (“FOI”), any Codes of Practice issued pursuant to it and the Environmental Information Regulations 2004 (each as amended, updated or replaced from time to time) (“**FOI requirements**”) and that consequently any Confidential Information of the other party held by the Authority pursuant to this Agreement may be subject to disclosure in response to a request for information made under the FOI requirements. The parties further acknowledge and agree that the Authority must consider each request for information individually on its own merit, considering the applicability of any exemptions to the specific circumstances, and that the final decisions as to whether any exemption applies to a request for information or as to whether to disclose information in response to a request are decisions solely for the Authority. The Authority agrees that before making a decision about how to respond to any request for information that involves the disclosure of Confidential Information of the other party, it will consult with the other party about the possible disclosure of its Confidential Information in accordance with any applicable guidance relating to the FOI requirements. In any event the Authority shall not be liable to the other party for any loss, damage, harm or other detriment however caused arising from the disclosure of any Confidential Information of the other party in accordance with the FOI requirements.

6. Each party undertakes, on receipt of a written request from the other, whether upon completion of the Purpose or at any other time:
  - (a) immediately to deliver up to the other party all documents and other data storage media whatsoever, including any copies made or created by the receiving party, containing any part of the Confidential Information of the other party; and
  - (b) immediately to cease use of the Confidential Information of the other party whether for the Purpose or for any other purpose whatsoever.
7. The parties warrant that they are under no obligation to any other person, firm or company which in any way prevents or restricts them from entering into this Agreement and undertaking and performing the obligations contained in it.
8. The parties agree that this Agreement is to be governed by and construed according to English law and accept the non-exclusive jurisdiction of the English courts.

## Schedule

**Purpose:** **[Insert description]**

**Period of the Agreement:** The period of **[insert]** months/years commencing with the date of this Agreement.

Signed \_\_\_\_\_  
for and on behalf of **[insert name of Authority]**

Name (caps) \_\_\_\_\_  
Position \_\_\_\_\_  
Date \_\_\_\_\_

**[If the other party is not a company]**

Signed \_\_\_\_\_

for and on behalf of **[insert name of party]**

Name (caps) \_\_\_\_\_  
Position \_\_\_\_\_  
Date \_\_\_\_\_

**[OR if the other party is a company]**

SIGNED for and on behalf of  
**[Insert name of company]**  
by

.....  
(1) Director

and

.....  
(2) Director/Secretary

## Guidance notes for NHS staff

### Confidentiality Agreement

This confidentiality agreement has been drafted for use on occasions when we or our suppliers may be required to visit premises or attend meetings where new products, processes or services are being tested or discussed; in such cases the disclosure of any details could compromise the position of either party. This legally binding agreement ensures that both parties are aware of the responsibilities they owe each other.

Party (1) to the Agreement will be your organisation, an NHS body, referred to in clause 5 as the “Authority”.

Insert the name and address of the other party to the Agreement as party (2). Where party (2) is a limited company, it should be described as:

“**[insert name]** Limited **or** Ltd (Company No: **[insert number]**) of **[insert address]**”

Choose one of the alternative definitions of “**Confidential Information**” and delete the other definition. It is important to choose the definition which is appropriate to the particular circumstances in which the Agreement is being prepared.

**Wide definition** Choose this definition where you wish to give the widest scope to the obligations of confidence – you might particularly want to use this definition if you are the party making the most significant disclosures to the other. The definition covers all information disclosed, whether before or after the date of the agreement and whether or not it specifically relates to the Purpose. This definition is therefore appropriate where you are embarking on a new commercial relationship and there is no history of other information unrelated to the Purpose having passed between you and the other party which could be caught by this wide definition. There is no requirement for information to be labelled as being confidential before it is protected by the obligations in the Agreement. It applies both to information which is intentionally disclosed and extends to cover information which directly or indirectly comes to the parties' attention in some other way, e.g. information about something observed by chance while visiting the other party's premises.

If the mere fact that the parties are in discussion at all is confidential too, include the following additional wording at the end of the **Wide definition**: “and the fact that the parties are entering into discussions relating to and the existence of the Purpose and this Agreement;”

**Standard definition** This is narrower than the first option. You might choose this option if both parties are disclosing information of broadly equal significance to each other. This definition is also appropriate where you have an ongoing relationship with the other party, as it is limited to information disclosed between you which relates specifically to the Purpose as described in the Schedule. It is also restricted to information which is intentionally disclosed and does not extend to information which directly or indirectly comes to the parties' attention in some other way, e.g. information about something observed by chance while visiting the other party's premises. Again, there is no requirement for the information to be labelled as being confidential before it is protected under the Agreement.

You may wish, however, to further amend the **Standard definition** so that the Agreement only applies to information which has been specifically marked in some way by the other party as being “Confidential” or “Proprietary”. This might particularly be the case if you will only be receiving the other party's information and not disclosing any of your own and you wish to restrict your obligations

as much as possible. To do this, delete the words “whether or not” in the penultimate line and substitute “which has been”.

**Clause 2** describes the obligations of the parties and **Clause 3** limits those obligations in the case of information, e.g. which is already known to the recipient or is subsequently published by the disclosing party.

**Clause 4** allows the parties to pass Confidential Information on to those necessary employees, etc. who need to have access to it.

Employees will be under a duty of confidentiality to their employers, but it is still important to ensure that those employees who will have access to Confidential Information are fully aware of its confidential nature and the terms of this Agreement.

Under the terms of this Agreement the parties can pass each other’s Confidential Information to their agents, sub-contractors, consultants and professional advisers who are involved in the Purpose. It is important to make sure that such persons are subject to an appropriate confidentiality provision in their contracts of engagement.

Finally, if you need to be able to pass the other party’s Confidential Information to any other person or organisation, even within the NHS, you will need to amend the Agreement to allow you to do this or seek the specific consent of the other party before doing so.

**Clause 5** allows public authorities to comply with the requirements of FOIA 2000 without being in breach of their confidentiality obligations and ensures that private sector parties are alerted to the statutory limitations on withholding information under which public authorities must operate.

**Clause 6** contains obligations to return and stop using the other party’s Confidential Information on request, whether such request is made before or after the confidentiality period in the Agreement has come to an end.

**Clause 7** is particularly important for private sector parties who must warrant that they are not under any obligation which prevents them from honouring their obligations under the Agreement, such as arrangements with other group companies.

**Clause 8** this Agreement will be legally binding on both parties and any disputes arising under it may be resolved by litigation. Note that where the unauthorised use of Confidential Information is likely to cause considerable or uncompensatable harm, for which monetary compensation would not be an adequate remedy, a party to whom a duty of confidence is owed which has been or may be breached may apply for an injunction to prevent any threatened or actual breach of confidence.

### **Schedule**

Ensure that the details set out in the schedule are completed. Include as full as description of the Purpose as you can. Consider how long the obligations under the Agreement need to continue, ie how long is the information of either party which is likely to be disclosed to the other reasonably going to remain confidential to the discloser. In some case this may be a very short period of a few months. In other cases, where highly technical innovations are disclosed the period may be much longer, even as long as 20 years in the case of patentable inventions.

### **Signature block**

Insert the name of the Authority in the first signature block. There are then two alternative signature blocks for the other party, one for use where it is a company and one for use where it is not. Only

include whichever one is relevant and delete the other. Ensure that the wording in square brackets has been deleted: **[If the other party is not a company]** and **[OR if the other party is a company]**. Insert the name of the company where indicated.

**Document revision control**

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February 2007	David Brassington	Revised to reflect FOI obligations and optional definitions of Confidential Information. Separated from Letter of intent	1 February 2007