Network Contract Directed Enhanced Service

Template Data Processing Agreement

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NHS England and NHS Improvement

**Template Data Processing Agreement**

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This information can be made available in alternative formats, such as easy read or large print, and may be available in alternative languages, upon request. Please contact [insert name] on [insert contact details].

**Template Data PROCESSing Agreement**

This Data Processing Agreement is a template only for the purposes of facilitating discussions within a Primary Care Network in relation to data processing to support delivery of the Network Contract Directed Enhanced Service. This template has been jointly agreed between NHS England and GPC England.

The use of this template is not mandatory. Primary Care Networks are free to enter into different forms of data processing agreement at their discretion.

If this template is used, it needs to be developed further between the members of the Primary Care Network. Guidance notes have been prepared to accompany this template. This template is not capable of execution in its current form.

This template and the guidance notes (included at the end of the document) do not constitute legal advice in relation to a Primary Care Network’s data protection obligations and NHS England and GPC England accept no liability in relation to the use of this template.

**DATA PROCESSING AGREEMENT**

**THIS AGREEMENT** is made the \_\_\_\_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ 20[ ]

**BETWEEN:**

1. **[PARTY 1]** of [ADDRESS] (**“PCN Controller”**); and
2. **[PARTY 2]** of [ADDRESS] (**“PCN Processor”**),

(with each a "**Party**"and both the "**Parties**").

**BACKGROUND:**

1. The Parties are party to the Primary Care Network Agreement.
2. The PCN Processor is required to Process the Processor Shared Personal Data on behalf of the PCN Controller in connection with the Primary Care Network Agreement.
3. This Agreement effects the appointment of the PCN Processor and sets out the terms and conditions that shall apply to its Processing of the Processor Shared Personal Data.

**NOW IT IS HEREBY AGREED** as follows:

# DEFINITIONS AND INTERPRETATION

## In this Agreement unless the context otherwise requires the following words and expressions shall have the following meanings:

|  |  |
| --- | --- |
| “Commencement Date” | [the date of this Agreement]; |
| "Controller" | has the meaning given to it in the GDPR; |
| “Data Protection Impact Assessment” | means an assessment by the PCN Controller, for the purposes of Article 35 of the GDPR, of the impact of certain envisaged Processing of the Processor Shared Personal Data; |
| "Data Protection Legislation" | means all applicable data protection and privacy legislation in force from time to time in the UK including but not limited to the GDPR, the Data Protection Act 2018 and the Privacy and Electronic Communications (EC Directive) Regulations 2003 and any guidance or codes of practice issued by any Supervisory Authority from time to time; |
| "Data Subject" | has the meaning given to it in the GDPR; |
| “Data Subject Access Request” | a request made by, or on behalf of, a Data Subject in accordance with the Data Subject’s rights under the Data Protection Legislation to access their Personal Data; |
| "GDPR" | General Data Protection Regulation (Regulation (EU) 2016/679); |
| “International Organisation” | has the meaning given to it in the GDPR; |
| “Law” | means any law, subordinate legislation within the meaning of Section 21(1) of the Interpretation Act 1978, enforceable right within the meaning of Section 2 of the European Communities Act 1972, regulation, order, mandatory guidance or code of practice, judgment of a relevant court of law, or directives or requirements with which the Processor is bound to comply; |
| “Personal Data” | has the meaning given to it in the GDPR; |
| “Personal Data Breach” | has the meaning given to it in the GDPR and includes also any breach of Article 5(1)(f) (the integrity and confidentiality principle) of GDPR; |
| “Primary Care Network Agreement” | means the Primary Care Network Agreement dated [DATE] and made between the Parties; |
| "Processing" | has the meaning given to it in the GDPR, and the terms “**Process**” and “**Processed**” shall be construed accordingly; |
| “Processor” | has the meaning given to it in the GDPR; |
| “Processor Shared Personal Data” | means such item(s) forming part of the Shared Personal Data as are more particularly specified in Annex 1 of this Agreement; |
| “Processor Personnel” | means all directors, officers, employees, agents, consultants and contractors of the PCN Processor and/or of any Sub-Processor engaged in the performance of its obligations under this Agreement; |
| **“Shared Personal Data”** | means the Personal Data to be shared under the Primary Care Network Agreement; |
| **“Sub-Processor”** | means any third party appointed to Process the Processor Shared Personal Data on behalf of the PCN Processor; |
| **“Third Country”** | means any country other than the UK [, a European Union Member State or a member of the European Economic Area at the time of transfer of the Processor Shared Personal Data]; and |
| **“Supervisory Authority”** | has the meaning given to it in the GDPR. |

## Clause, Annex and paragraph headings shall not affect the interpretation of this Agreement.

## The Annexes form part of this Agreement and shall have effect as if set out in full in the body of this Agreement. Any reference to this Agreement includes the Annexes.

## Unless the context otherwise, requires, words in the singular shall include the plural and in the plural shall include the singular.

## A reference to a person shall include any company, corporation or other body corporate, wherever and however incorporated or established.

## A reference to a statute or statutory provision shall include all subordinate legislation made from time to time under that statute or statutory provision, and such statute, statutory provision and subordinate legislation as amended, updated or re-enacted from time to time during the Term.

## References to clauses and annexes are to the clauses and annexes of this Agreement and references to paragraphs are to paragraphs of the relevant Annex.

## Any words following the terms “including”, “include”, “in particular”, “for example” or any similar phrase shall be construed as illustrative and shall not limit the generality of the related general words.

## In the case of any ambiguity between any provision contained in the main body of this Agreement and any provision contained in the Annexes, the provision in the main body of this Agreement shall take precedence.

## A reference to writing or written [excludes fax but includes email].

# COMMENCEMENT AND DURATION

## This Agreement shall commence on the Commencement Date and continue in force until one of the following events occurs:

### the termination or expiry of the Primary Care Network Agreement;

### either Party ceases to be a party to the Primary Care Network Agreement by reason of voluntary exit or expulsion; or

### [the PCN Controller terminates the appointment of the PCN Processor by giving not less than [one (1) month’s] prior notice to the PCN Processor],

### at which point this Agreement shall terminate with immediately effect.

## On the expiry or termination of this Agreement, the PCN Processor shall cease to Process the Processor Shared Personal Data.

# DATA PROCESSING

## For the purposes of the Data Protection Legislation, the PCN Controller is the Controller and hereby appoints the PCN Processor as its Processor, on the basis that the only Processing that the PCN Processor is authorised to do is the Processing described in Annex 1.

## The PCN Processor shall notify the PCN Controller immediately if it considers that any of the PCN Controller's instructions does not comply with the Data Protection Legislation and/or with Law. If the PCN Processor acts on the PCN Controller’s instructions without giving any such notification, the PCN Processor shall be deemed to have evaluated such instructions and concluded that they comply with the Data Protection Legislation and with Law.

## If the Processing to be carried on by the PCN Processor is to any extent subject to Article 35 and/or Article 36 of GDPR, the PCN Processor shall provide reasonable assistance to the PCN Controller in the preparation of the Data Protection Impact Assessment prior to commencing any Processing. Such assistance may, at the discretion of the PCN Controller, include:

### a systematic description of the envisaged Processing operations and the purpose of the Processing;

### an assessment of the necessity and proportionality of the Processing operations;

### an assessment of the risks that the Processing shall pose to the rights and freedoms of Data Subjects; and

### the measures proposed or envisaged to address such risks, including appropriate technical and organisational measures to ensure the protection of the Processor Shared Personal Data.

## The PCN Processor shall, in relation to any Processor Shared Personal Data Processed by it:

### Process that Processor Shared Personal Data only in accordance with Annex 1 and in accordance with the PCN Controller’s written instructions (including with respect to transfers of Personal Data to a Third Country or International Organisation), unless the PCN Processor is required to do otherwise by Law (and if so required by Law the PCN Processor shall promptly notify the PCN Controller before Processing the Processor Shared Personal Data unless prohibited by Law);

### keep the Processor Shared Personal Data confidential and not disclose it to any third party without the prior written consent of the PCN Controller;

### take appropriate technical and organisational measures to ensure a level of security appropriate to the risks that are presented by such Processing, in particular from accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to the Processor Shared Personal Data, taking into account the state of the art, the costs of implementation, the nature, scope, context and purposes of Processing as well as the risk of varying likelihood and severity for the rights and freedoms of the Data Subjects, including as appropriate:

#### the pseudonymisation and encryption of the Processor Shared Personal Data;

#### the ability to ensure the ongoing confidentiality, integrity, availability and resilience of Processing systems and services;

#### the ability to restore the availability and access to the Processor Shared Personal Data in a timely manner in the event of a physical or technical incident; and

#### a process for regularly testing, assessing and evaluating the effectiveness of technical and organisational measures for ensuring the security of the Processing;

### ensure that:

#### the Processor Personnel do not Process any Processor Shared Personal Data except in accordance with this Agreement (and in particular Annex 1);

#### it takes all reasonable steps to ensure the reliability and integrity of any Processor Personnel who have access to the Processor Shared Personal Data and ensure that they:

##### are aware of and comply with the PCN Processor’s duties under this Clause 3;

##### are subject to appropriate confidentiality undertakings that are enforceable by the PCN Processor and/or are under an appropriate statutory obligation of confidentiality;

##### are informed of the confidential nature of the Processor Shared Personal Data and do not publish, disclose or divulge any of the Processor Shared Personal Data to any third party unless directed in writing to do so by the PCN Controller or as otherwise permitted by this Agreement; and

##### have undergone adequate training in the use, care, protection and handling of Personal Data;

### not transfer the Processor Shared Personal Data outside of the EU (for so long as the United Kingdom remains a member of the EU) or outside of the United Kingdom (if the United Kingdom ceases to be a member of the EU), or to any International Organisation unless the prior written consent of the PCN Controller has been obtained and the following conditions are fulfilled:

#### the PCN Processor has, prior to such transfer, established, or procured the establishment of, appropriate safeguards in relation to the transfer of the Processor Shared Personal Data;

#### each Data Subject whose Personal Data is transferred has enforceable rights and effective legal remedies which are enforceable against the PCN Processor, and the PCN Processor has ensured prior to any such transfer that such rights and remedies are available; and

#### the PCN Processor complies with its obligations under the Data Protection Legislation by providing an adequate level of protection for all Processor Shared Personal Data that is transferred (or procures that such protection is provided); and

#### the PCN Processor complies with all reasonable instructions notified to it in advance of such transfer by the PCN Controller with respect to such transfer.

## Subject to Clause 3.6, the PCN Processor shall notify the PCN Controller immediately if it:

### receives any Data Subject Access Request (or purported Data Subject Access Request);

### receives any request to rectify, block or erase any Processor Shared Personal Data;

### receives any other request, complaint or communication relating to either Party's obligations under the Data Protection Legislation;

### receives any communication from any Supervisory Authority or any other regulatory authority in connection with Processor Shared Personal Data;

### receives a request from any third party for disclosure of Processor Shared Personal Data where compliance with such request is required by Law; or

### becomes aware of any Personal Data Breach (and such notification shall be made not later than twenty-four (24) hours following the PCN Processor becoming aware of each Personal Data Breach).

## The PCN Processor’s obligation to notify the PCN Controller under Clause 3.5 shall include an obligation to provide information in accordance with Clause 3.7, and an obligation to provide further information to the PCN Controller in phases, as further details become available.

## The PCN Processor shall assist and co-operate with the PCN Controller in relation to the PCN Controller’s compliance with its obligations under Data Protection Legislation (including each complaint, communication or request made under Clause 3.5 as well as any other complaint, communication or request relating to any Processor Shared Personal Data), and shall do so within the timescales reasonably required by the PCN Controller. In particular the PCN Processor shall promptly provide the PCN Controller with:

### full details and copies of each complaint, communication or request received by the PCN Processor (or received by the PCN Controller and relating to any Processor Shared Personal Data);

### such assistance as is reasonably requested by the PCN Controller to enable the PCN Controller to comply with each Data Subject Access Request within the relevant timescales specified in or under the Data Protection Legislation;

### copies of any Processor Shared Personal Data specified by the PCN Controller, and details of the Processing of such Processor Shared Personal Data by or on behalf of the PCN Processor;

### assistance as requested by the PCN Controller in relation to any Personal Data Breach;

### assistance to ensure that Processing of Processor Shared Personal Data by or on behalf of the Processor complies with any exercise by any relevant Data Subject of any of his or her rights under Data Protection Legislation, including to ensure that the Processor Shared Personal Data relating to such Data Subject is (for example) deleted and/or rectified and/or made subject to restrictions in accordance with such exercise of such rights; and

### assistance as requested by the PCN Controller with respect to any request from a Supervisory Authority, or any consultation by the PCN Controller with a Supervisory Authority.

## The PCN Processor shall maintain complete and accurate records and information of the Processing it carries out in connection with this Agreement, which shall contain as a minimum:

### its details, the PCN Controller’s details and the details of the PCN Processor’s data protection officer (if applicable) or, if the PCN Processor is not subject to a mandatory requirement under Data Protection Legislation to appoint such an officer, the details of the person who has overall responsibility for the PCN Processor’s compliance with the Data Protection Legislation;

### the categories of Processing of the Processor Shared Personal Data that are carried out by or on behalf of the PCN Processor;

### the details of any transfers to any Third Countries, where applicable, and the safeguards in place for each such transfer; and

### accurate records of the technical and organisational measures that the PCN Processor has in place in accordance with clause 3.4.3.

## The PCN Processor shall allow for and contribute to audits of its Processing activities (including the records maintained under clause 3.8) by the PCN Controller or the Controller’s designated auditor. The PCN Controller’s rights under this clause 3.9 include a right for the PCN Controller, or its designated auditor, to access premises used by or on behalf of the PCN Processor, and to access and interview any Processor Personnel.

## Each Party shall designate its own data protection officer if required by the Data Protection Legislation or (if not so required) shall designate one of its senior managers as being responsible for overseeing and managing the Party’s compliance with Data Protection Legislation.

## Before allowing any Sub-Processor to Process any Processor Shared Personal Data, the PCN Processor must:

### notify the PCN Controller in writing of the intended Sub-Processor and Processing;

### obtain the written consent of the PCN Controller to the PCN Processor appointing or using the proposed Sub-Processor to Process certain Processor Shared Personal Data;

### enter into a written agreement with the Sub-Processor which appoints the Sub-Processor on terms and conditions that comply with Data Protection Legislation and are no less onerous on the Sub-Processor, and no less protective of the Processor Shared Personal Data and of Data Subjects, than the provisions of this Agreement; and

### provide the PCN Controller with such information regarding the proposed Sub-Processor as the PCN Controller may reasonably require.

## If any authorisation is given under clause 3.11.2, the PCN Processor shall not make any changes concerning the addition or replacement of other Processors without first obtaining the PCN Controller’s written consent to such changes.

## The PCN Processor shall remain fully responsible for, and liable in respect of, all acts or omissions of its sub-Processors.

## The PCN Controller may, at any time on not less than thirty (30) days’ notice, amend this Clause 3 by replacing it with any applicable Controller to Processor standard clauses.

## In the event of a notification under clause 3.5.6, the PCN Controller shall at its sole discretion determine whether to provide notification to the Data Subject, any third party or Supervisory Authority, and the PCN Processor shall not notify the Data Subject, any third party or Supervisory Authority unless such disclosure is required by Law or is otherwise approved by the PCN Controller.

## At the PCN Controller’s request (and in any event within three (3) days of each such request) the PCN Processor shall make available to the PCN Controller all information necessary to demonstrate the PCN Processor’s compliance with its obligations under this clause 3, including the records referred to in clause 3.8.

## At the written direction of the PCN Controller given at any time (whether during the continuance of this Agreement, on the termination or expiry of this Agreement, or at any time after its termination or expiry), the PCN Processor shall promptly (and in any event within three (3) days) return to the PCN Controller and, if and when the PCN Controller specifies, delete, the Processor Shared Personal Data or any part of it that is specified by the PCN Controller (together with all copies of such Processor Shared Personal Data), unless the Processor is required by Law to retain the Processor Shared Personal Data.

## Nothing in this clause 3 shall relieve the PCN Processor of its own direct responsibilities and liabilities under the Data Protection Legislation, where applicable.

## The Parties agree to take account of any guidance issued by the Information Commissioner. The PCN Controller may on not less than thirty (30) days’ notice to the PCN Processor amend this Agreement to ensure that it complies with any guidance issued by the Information Commissioner.

# DISPUTE RESOLUTION

## The Parties intend for the dispute resolution procedures set out in the Primary Care Network Agreement to apply to this Agreement.

# VARIATION

## Subject to Clauses 3.14 and 3.19, any amendment or variation to this Agreement shall be in writing and signed by duly authorised representatives of each of the Parties.

## If the Data Protection Legislation changes in a way that the Agreement is no longer adequate for the purpose of governing lawful Processing exercises, the Parties agree they will negotiate in good faith to review the Agreement in the light of the new legislation.

# NOTICES

## Any notice or other communication given by either Party under or in connection with this Agreement shall be in writing and shall be:

### delivered by hand, courier or by recorded post or other next working day recorded delivery service at its registered office (if a company) or its principal place of business (in any other case)[; or

### sent by email to the following addresses: [Party 1 address] and [Party 2 address]].

## Any notice or communication shall be deemed to have been received:

### if delivered by hand or courier, on the date on which the delivery receipt is signed;

### if sent by recorded post or other next working day recorded delivery service, at the time recorded by the delivery service; and

### if delivered by email, at the time of transmission, or, if this time falls outside business hours in the place of receipt, when business hours resume,

## and in this clause 6.2 “business hours” means 9.00am to 5.00pm Monday to Friday on a working day, and in this clause 6 “working day” means that is not a weekend or public holiday in the place of receipt.

## This clause 6 shall not apply to the service of any proceedings or other documents in any legal action or, where applicable, any arbitration or other method of dispute resolution.

# SEVERABILITY

## If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.

## If any provision or part-provision of this Agreement is deemed deleted under clause 7.1, the Parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

# WAIVER

## No failure or delay by any Party to exercise any right, power or remedy will operate as a waiver of it nor will any partial exercise preclude any further exercise of the same or of some other right to remedy.

# THIRD PARTY RIGHTS

## A person who is not a Party to this Agreement shall have no rights pursuant to the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement.

# ENTIRE AGREEMENT

## This Agreement supersedes all prior representations and agreements between the Parties (whether written or oral) relating to the subject matter of the Agreement and sets forth the entire agreement and understanding between the Parties.

## Each Party warrants to the other that it has not relied on any representation or agreement (whether written or oral) not expressly set out or referred to in the Agreement.

# COUNTERPARTS

## This Agreement may be executed in one or more counterparts. Any single counterpart or a set of counterparts executed, in either case, by the Parties shall constitute a full original of this Agreement for all purposes.

# GOVERNING LAW AND JURISDICTION

## Each Party submits to the exclusive jurisdiction of the English courts and agrees that the Agreement is to be governed and construed according to English law.

This Agreement has been entered into on the date stated above.

**ANNEX 1**

**Data Processing**

| **Description** | **Details** |
| --- | --- |
| Subject matter of the Processing |  |
| Duration of the Processing |  |
| Nature and purposes of the Processing |  |
| Type(s) of Personal Data |  |
| Categories of Data Subject |  |

**Signature Page**

**Template Data Processing Agreement**

**Guidance Notes**

|  |  |
| --- | --- |
| **Provision** | **Comment** |
| **General** | Clause 37 of the Primary Care Network Agreement (“the Network Agreement”) provides that, if any member of the Network Agreement processes personal data on behalf of other members, the relevant members will enter into a data processing agreement.  The template Data Processing Agreement (“DPA”) has been prepared for this purpose. The DPA is for guidance only and it is not mandatory to use the DPA. Members are free to enter into different forms of data processing agreement at their discretion.  The parties should each obtain independent legal advice on the DPA before entering into it.  If the DPA is used, it will need to be amended to reflect the specific processing of personal data that is contemplated by the parties. Gaps, including those marked in square brackets, must all be completed before the DPA is signed by the parties.  The DPA is a legally binding contract. Where a processor processes personal data on behalf of a controller, it is a legal requirement to have a written contract (or other legal act) in place which must include certain mandatory terms.  The main body of the DPA sets out the general terms that will apply and can be amended to include any specific terms that are agreed between the parties. Annex 1 will contain the details of the processing that is contemplated, and will need to be completed by the parties before the DPA is entered into.  No liability or indemnity provisions have been included in the DPA. The parties should each obtain independent legal advice on liability, and include any required liability and indemnity provisions (if any) before entering into the DPA. |
| **Main Body** | |
| **Dates and Parties** | The date and details of the parties at the beginning of the DPA must be completed. The date should be added by hand once the DPA has been signed by all parties to the DPA.  If not all of the parties to the DPA are to be members of the Network Agreement, references to the Network Agreement in the DPA should be considered and amended accordingly. |
| **Clause 1**  **Definitions and Interpretation** | The definition of “Commencement Date” can be amended as required. This is the date on which the DPA will commence. The date of the Network Agreement should also be added to the definition of “Primary Care Network Agreement”.  The definition of “Third Country” contains square brackets as this definition may be impacted by Brexit. The parties should seek legal advice in relation to the potential implications of Brexit in relation to data protection.  Clause 1.10 permits the service of written notices by email. This can be removed if required (and if so, references to email in clause 6 should also be removed). |
| **Clause 2 Commencement and Duration** | The DPA is drafted on the basis that it is coterminous with the Network Agreement, or will terminate if a party ceases to be a member of the Network Agreement. Clause 2.1.3 also includes optional wording to permit the controller to terminate the DPA without cause by giving notice to the processor. |
| **Clause 3 Data Processing** | This clause sets out the key data processing obligations of the parties, including their obligations under applicable data protection legislation. The details of the data to be processed are to be included in Annex 1 of the DPA.  Many of the provisions contains in this clause 3 are required to be included by law so these should not be amended without the parties having first sought legal advice. |
| **Clause 4 Dispute Resolution** | No specific dispute resolution provisions have been included in the DPA and it has been drafted on the basis that the dispute resolution provisions of the Network Agreement shall apply. |
| **Clause 6 Notices** | If written notices may be served by email (see clause 1.10), enter the relevant email addresses in clause 6.1.2. If written notices are not to be served by email, all references to email should be removed from this clause. |
| **Annex 1** | |
| **Subject Matter of the Processing** | This should be a high level, short description of what the processing is about i.e. its subject matter. |
| **Duration of the Processing** | Insert details of any retention periods and policies here. Retention periods should already be specified in detail in each party’s existing retention policies, as well as in the privacy notice. |
| **Nature and Purposes of the Processing** | Please be as specific as possible, but make sure that this section lists all intended purposes. |
| **Type(s) of Personal Data** | List all categories of processor shared personal data that are to be processed under the DPA. There may be a lot of fields of data to insert: this could be done by way of an appendix to Annex 1. |
| **Categories of Data Subject** | List all categories of data subject whose personal data will be processed under the DPA. There may be a lot of fields of data to insert: this could be done by way of an appendix to Annex 1. |
| **Signature Page** | This is where the signature clauses for the original parties to the DPA must be set out. |