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Does Your Government Contract Allow You to Safeguard Clients' Confidential Information?

New York State and New York City fund nonprofits to provide a wide array of services to the public. People who receive those services often entrust the nonprofits with their most sensitive personal information. Nonprofits may need to be able to safeguard that information in order to protect clients' safety, earn clients' trust, and satisfy the contractors' own professional, ethical, or legal obligations. Some government contract templates can compromise contractors' ability to safeguard that information.

When entering into a new government contract, it is important to make sure the contract adequately protects the organization's ability to protect confidential client information. Here are a few questions to ask:

- Does the contract make clients' case files the property of the contractor or of the government?
- Does the contract require the contractor to provide clients' case files to the government when the contract terminates?
- Does the contract allow the organization to protect client information when the government makes site visits or audits the program's records?
- Does the contract restrict contractors' ability to use clients' case files to provide services outside of the government program?

Both the New York City Standard Human Services Contract and the New York State Contract for Grants templates contain provisions that limit contractors' ability to safeguard and retain confidential client information.¹ Appendix A to this Legal Alert lists some of the relevant provisions.

The State and the City should fix this language in their master contracts. Until they do, here are some things that nonprofit contractors can do to try to protect themselves and their clients:

- Talk to the government agencies that fund your organization. Make sure they understand the importance of allowing nonprofits to protect confidential client information. Depending on the type of services your organization provides, you may be able to point to federal or state laws or ethical codes governing your profession that require you to keep client information confidential.

¹ The NYS Contract for Grants template is available at <https://www.budget.ny.gov/guide/bprm/h/h-1032-nys-contract-for-grants-2024.pdf>. There does not appear to be an easy way to link to the NYC Standard Human Services Contract template, but it can be viewed in connection with individual RFPs on NYC's Passport website at https://passport.cityofnewyork.us/page.aspx/en/rfp/request_browse_public.

- Government agencies can issue a contract rider (such as agency-specific terms and conditions) to allow nonprofit contractors to keep client information confidential. The protective language should make clear that it supersedes any language to the contrary in the master contract. Associations can play a crucial role in educating government agencies about their members' need for agency or program-specific terms and conditions.

Nonprofit contractors should be aware that a court might find that this protective language is overruled by master contract language abrogating client confidentiality, particularly if the master contract states that it takes precedence over any agency-specific terms and conditions.

- It is difficult for individual nonprofits to negotiate changes to a master state or city contract, but it is not impossible! Some larger social services organizations have successfully negotiated contract language that allows them to protect client confidentiality.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Laura Abel at label@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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Appendix A – Relevant Provisions of NYS and NYC Contract Templates

1. Are clients' case files the property of the contractor?

a. *NYS Contract for Grants (2024)* – No

Client files are included in the “Confidential Information” that “is at all times the sole property of the State.” (sec. III.F.5)

b. *NYC Standard Human Services Contract (2018)* – Not addressed

2. Can contractor keep clients' case files when contract ends?

a. *NYS Contract for Grants (2024)* – Sometimes

“Where allowable by law and agreed to by the State, Contractor may retain one copy...as required by law, regulation, professional standards, or reasonable business practice.” (sec. III.6)

b. *NYC Standard Human Services Contract (2018)* – Sometimes

“At the request of the Department, the Contractor shall return to the Department any and all confidential information in the possession of the Contractor or its subcontractors. If the Contractor or its subcontractors are legally required to retain any confidential information, the Contractor shall notify the Department in writing and set forth the confidential information that it intends to retain and the reasons why it is legally required to retain such information. The Contractor shall confer with the Department, in good faith, regarding any issues that arise from the Contractor retaining such confidential information.” (Appendix A, sec. 5.08.E)

3. Does the contract allow the contractor to protect sensitive client information when the government makes site visits or audits the program's records?

a. *NYS Contract for Grants (2024)* – Not addressed

b. *NYC Standard Human Services Contract (2018)* – Possibly

“Upon request by the Department of a record that contains protected personally identifiable information as such phrase is defined in Admin. Code § 10-501 or a record that if disclosed would constitute a waiver of a legal privilege or violate the Law or an ethical obligation under the New York Rules of Professional Conduct for attorneys, National Association of Social Workers Code of Ethics or other similar code governing the provision of a profession's services in New York State, Contractor may redact such personally identifiable or privileged information or other information that if disclosed would violate the Law or such professional code. In addition, Contractor may, upon request to and written approval from the Department, which approval may not be unreasonably denied or delayed, withhold from disclosure to the Department certain categories of documents that are not protected by a legal privilege or other Law but where Contractor reasonably believes that disclosure of such documents would interfere with or impair the provision of services under this Agreement.” (Contract sec. 5.01.A)

Government agency has “the right to have representatives of the Department or of the City, State or federal government present to observe the services being performed. If observation of particular services or activity would constitute a waiver of a legal privilege or violate the Law or an ethical obligation under the New York Rules of Professional Conduct for attorneys, National Association of Social Workers Code of Ethics or other similar code governing the provision of a profession’s services in New York State, the Contractor shall promptly inform the Department or other entity seeking to observe such work or activity. Such restriction shall not act to prevent government representatives from inspecting the provision of services in a manner that allows the representatives to ensure that services are being performed in accordance with this Agreement.” (Contract sec. 5.01.C & Appendix A, sec. 5.03.B)

4. Can contractor use clients’ case files to provide services outside of the government-funded program

- a. *NYS Contract for Grants (2024)* -- No

Contractor agrees not to “use confidential, personally identifiable information relating to individuals who may receive services ... for any purpose other than in connection with the services or work” (sec. III.F.1; also sec. III.F.7)

- b. *NYC Standard Human Services Contract (2018)* -- Yes, although contract may restrict ability to share that information with other service providers unless required to do so by law

“The Contractor agrees to hold confidential, both during and after the completion or termination of this Agreement, all of the reports, information, or data, furnished to, or prepared, assembled or used by, the Contractor under this Agreement. The Contractor agrees to maintain the confidentiality of such reports, information, or data by using a reasonable degree of care, and using at least the same degree of care that the Contractor uses to preserve the confidentiality of its own confidential information. The Contractor agrees that such reports, information, or data shall not be made available to any person or entity without the prior written approval of the Department. The obligation under this Section 5.08 to hold reports, information or data confidential shall not apply where the Contractor is legally required to disclose such reports, information or data, by virtue of a subpoena, court order or otherwise (“disclosure demand”), provided that the Contractor complies with the following: (1) the Contractor shall provide advance notice to the Commissioner, in writing or by e-mail, that it received a disclosure demand for to disclose such reports, information or data and (2) if requested by the Department, the Contractor shall not disclose such reports, information, or data until the City has exhausted its legal rights, if any, to prevent disclosure of all or a portion of such reports, information or data. The previous sentence shall not apply if the Contractor is prohibited by law from disclosing to the Department the disclosure demand for such reports, information or data.” (Appendix A, sec. 5.08.A)