

# Guideline 5

Utilize Memoranda of Understanding (MOUs), Non-Disclosure Agreements (NDAs), or other types of agency agreements, as appropriate.

## Memorandum of Understanding (MOU) and Non-Disclosure Agreement (NDA)

### MOU

It is recommended that fusion centers be governed and managed in accordance with an MOU. An MOU, a necessary tool for information sharing, defines the terms, responsibilities, relationships, intentions, and commitments of each participating entity; the agreement also provides an outline of the who, what, where, when, why, and how of the project. Partners should commit to the program policies by signing the MOU. In addition to MOUs, some initiatives utilize agency, individual, and data sharing user agreements.

### Issues for Consideration

When negotiating and drafting MOUs, consider:

- Identifying and understanding the legal and practical implications of the MOU.
- Defining the roles and responsibilities of the participating agencies.
- Embracing and encouraging trusted relationships.
- Including language requiring that all assigned personnel maintain access to their own agency's data.

### Example MOUs

At a minimum, include the following elements in the MOU:

- Involved parties
- Mission
- Governance
- Authority
- Security
- Assignment of personnel (removal/rotation)

- Funding/costs
- Civil liability/indemnification issues
- Policies and procedures
- Privacy guidelines
- Terms
- Integrity control
- Dispute resolution process
- Points of contact
- Effective date/duration/modification/termination
- Services
- Deconfliction procedure
- Special conditions
- Protocols for communication and information exchange
- Protocols for background checks on fusion center participants

### NDA

The fusion center determines risks to the private sector and analyzes suspicious activity information. This function requires the sharing of sensitive information from the private sector to the fusion center. To aid in sharing this sensitive information, a Non-Disclosure Agreement may be used. The NDA provides private sector entities an additional layer of security, ensuring the security of private sector proprietary information and trade secrets. The development of an NDA and a clear understanding of what it does and does not cover are critical to private sector participation.

One of the functions of the NDA is to provide a mechanism for fusion center leadership, participants, and personnel to protect information. NDAs will vary by jurisdictions, based on the types of private sector entities participating in the fusion center. Centers should specify the types of information covered in an NDA, e.g., strategic and risk assessment information. Tactical information, such as suspicious activity reports, should not be included in an NDA because this information may be shared with law enforcement outside of the fusion center (e.g., the Joint Terrorism Task Force (JTTF), Field Intelligence Group, the state police, or other appropriate agencies). Information that the

private sector may not want disseminated should be specified in the NDA. This information may include trade secret information (critical to a business operation), proprietary information (customer lists, throughput rates), and sensitive security information (guard schedules, site plans, security plan access). In addition, fusion centers should specify how this information is protected when creating an NDA. Subject-matter experts may provide fusion centers with intelligence related to their respective sectors without disclosure of trade secrets or proprietary information. But if this type of information is provided, fusion centers should be sensitive to the storing of the information without approval from the providing entity.

NDA's do not supersede public records laws or legal processes. Therefore, fusion centers should be cognizant of local, state, and federal public records laws that may supersede an NDA, such as state sunshine laws, the Freedom of Information Act (FOIA), and federal and state privacy laws and requirements. If the center has a legal committee, this committee should be able to provide input into the development and use of an NDA. In addition, it is recommended that fusion centers and their leadership encourage appropriate policymakers to legislate the protection of private sector data provided to fusion centers.

## Issues for Consideration

When developing an NDA, consider:

- Identifying and understanding the legal and practical implications of an NDA.
- Defining what information will be treated as confidential.
- Specifying what entities can receive confidential information.
- Indicating how long the NDA will be in effect.
- Identifying the types of information that the NDA will cover.
- Identifying repercussions for violation of the NDA.
- Clearly specifying local, state, and federal public records laws within the NDA.

- Specifying what information should be shared and protected (e.g., proprietary and trade secrets).
- If trade secrets or proprietary information is provided, an NDA may include the following caveats:
  - ✓ The information being provided is owned by the private sector partner and is provided for a limited purpose of determining a specific risk associated with the entity.
  - ✓ It is the private sector partner's responsibility to identify the information as proprietary.
  - ✓ Fusion centers should take into account local, state, and federal FOIA laws in an effort to ensure that information identified as proprietary may not be disclosed beyond the immediate recipient group without written consent of the providing private sector partner.

## Available Resources on Fusion Center CD

- 28 CFR Part 23 Sample MOU
- Arizona Counter Terrorism Information Center MOU
- California Public Records Exemption
- Canada Department of Defense (DOD) MOU Guidelines
- DHS Non-Disclosure Agreement, [www.fas.org/sgp/othergov/dhs-nda.pdf](http://www.fas.org/sgp/othergov/dhs-nda.pdf)
- Florida Statute 119.071
- Freedom of Information Act, [www.usdoj.gov/04foia](http://www.usdoj.gov/04foia)
- Joint Terrorism Task Force MOU
- Massachusetts Statute
- MOU Sample Template
- Rockland County Intelligence Center MOU
- Upstate New York Regional Intelligence Center MOU