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ITEM #14
WRKS
09/10/13

MEMORANDUM

August 27, 2013

TO: Board of Mayor and Aldermen

FROM: Eric Stuckey, City Administrator
Shirley Harmon, Human Resources Director
Tammie Pitts, Benefits Manager

SUBJECT: Contract 2013-0124, Business Associate Agreement - HITECH amending HIPAA Agreement with Sherrill Morgan

Purpose

The purpose of this amendment is to update the HIPAA Agreement with Sherrill Morgan, the City of Franklin's Employee Insurance Benefits Consultant, in order to comply with recent changes to the Health Insurance Portability and Accountability Act (HIPAA) and the Health Information Technology for Economic and Clinical Health Act, Title XIII of the American Recovery and Reinvestment Act of 2009 (HITECH).

Background

The City's Consulting Agreement including a HIPAA Agreement with Sherrill Morgan went into effect on March 22, 2011. In January 2013, the Department of Health and Human Services released final regulations that changed some of the required content of Business Associate Agreements including expanded privacy protection and control of protected health information. Covered entities and business associates are to be in compliance with these changes by September 23, 2013.

Financial Impact

Not applicable to this item.

Options

Not applicable to this item.

Recommendation

Approval of the Business Associate Agreement - HITECH is recommended.

BUSINESS ASSOCIATE AGREEMENT – HITECH

Contract 2013-0124, City of Franklin, TN

This Amendment (“Agreement”) is made to the most recent HIPAA Agreement (“Agreement”) made by and between Sherrill D. Morgan and Associates, Inc. DBA: SHERRILL MORGAN (hereinafter individually “Business Associate”), and The City of Franklin, Tennessee (“hereinafter “Plan Sponsor”).

WHEREAS, Business Associate and Plan Sponsor acknowledge that Plan Sponsor sponsors and maintains the employee welfare benefit plan or plans set forth on Exhibit A to this Agreement (hereinafter collectively referred to as the “Covered Entity” or the “Plan”) for which Business Associate provides specific services; and

WHEREAS, Business Associate and Plan Sponsor acknowledge that Business Associate is a Business Associate, as defined below) of the Covered Entity; and

WHEREAS, Business Associate and Plan Sponsor acknowledge that Business Associate may have contractual relationships with other service providers which provide services for the Plan and who are considered Trading Partners of Plan Sponsor; and

WHEREAS, Business Associate and Plan Sponsor desire to ensure that the standards of privacy and security for each Individual utilizing or obtaining Services are adhered to pursuant to the Health Insurance Portability and Accountability Act of 1996, as amended, (referred to herein as “HIPAA”) and all applicable federal and state laws, including but not limited to the Health Information Technology for Economic and Clinical Health Act, Title XIII of the American Recovery and Reinvestment Act of 2009 (the “HITECH Act”); and

WHEREAS, by executing this Agreement, the parties agree to abide by the terms and conditions of this Agreement.

In consideration of the promises and the mutual covenants and undertakings set forth in this Agreement, the parties have executed this Agreement through their duly authorized representatives as of the date noted above.

1. Definitions. All capitalized terms contained in this Agreement shall have the meaning ascribed to them in this Agreement. In the event of any conflict between a definition as contained in the Agreement and a definition contained in 45 CFR Parts 160 and 164, the definition contained in 45 CFR Parts 160 and 164 shall govern.

1.1 **Business Associate:** “Business Associate” shall have the same meaning as the term “Business Associate” in 45 CFR 160.103 and shall mean Business Associate in this Agreement.

1.2 **Covered Entity:** “Covered Entity” shall have the same meaning as the term “Covered Entity” in 45 CFR 160.103 and shall mean the employee welfare benefit plan or plans set forth on Exhibit A of the Agreement for whom Business Associate provides Services.

1.3 **Designated Record Set:** “Designated Record Set” shall have the same meaning as the term “Designated Record Set” in 45 CFR 164.501.

1.4 **Individual:** “Individual” shall have the same meaning as the term “individual” in 45 CFR 164.501 and shall include a person who qualifies as a personal representative in accordance with 45 CFR 164.502(g).

1.5 Trading Partner: "Trading Partner" shall mean an entity that contracts with the Business Associate to perform services for the Covered Entity, including, but not limited to: (a) a function or activity involving the use or disclosure of individually identifiable health information, including, but not limited to, utilization review, case management, subrogation, medical management, quality assurance, and data analysis. "Trading Partner" shall not include any person or entity with whom Covered Entity has entered into a contract with directly, even if Business Associate has also contracted with such person or entity.

1.6 Plan Sponsor: "Plan Sponsor" shall mean any client of Business Associate which is a corporation, partnership, labor union, association, employer, governmental entity, or any other group that provides self-funded health benefits to its employees or members pursuant to the terms of a plan. It is at the request of the Plan Sponsor that Business Associate is performing administrative and management functions, the "Services".

1.7 Privacy Rule: "Privacy Rule" shall mean the Standards for Privacy of Individually Identifiable Health Information at 45 CFR Parts 160 and 164

1.8 Protected Health Information: "Protected Health Information" or "PHI" shall have the same meaning as the term "protected health information" in 45 CFR 164.103, limited to the information created or received by Business Associate from or on behalf of the Covered Entity.

1.9 Required By Law: "Required By Law" shall have the same meaning as the term "required by law" in 45 CFR 164.103.

1.10 Secretary: "Secretary" shall mean the Secretary of the Department of Health and Human Services or his or her designee.

1.11 Services: "Services" shall mean: 1) the services performed by Business Associate on behalf of the Covered Entity for the Plan Sponsor; and 2) the services performed by a Trading Partner on behalf of the Covered Entity.

2. Business Associate Services: Business Associate will perform and provide Services on behalf of the Covered Entity, and at the request of the Plan Sponsor and/or Plan Administrator that may involve the use and disclosure of Protected Health Information.

3. Trading Partner Services: Business Associate may have contractual arrangements with business entities which provide services to the Plan Sponsor and to the Plan in support of Business Associate's Services that may involve the use and disclosure of Protected Health Information. Business Associate agrees to ensure that any Trading Partner with whom it contracts and provides PHI that is received from or provided on behalf of the Covered Entity shall agree in writing to all applicable terms of this Agreement. If Business Associate is unable to secure such written agreement, Business Associate shall notify Covered Entity to determine Covered Entity's options in utilizing such Trading Partner's services.

However, if Covered Entity directs Business Associate to forward or receive PHI from any other person or entity (whether or not the Covered Entity has directly contracted with such person or entity), Covered Entity agrees that it is the Covered Entity's responsibility to enter into a Business Associate agreement with such person or entity. Business Associate shall not be responsible for determining if such an agreement exists before complying with Covered Entity's instruction as to the delivery or receipt of PHI by the person or entity on Covered Entity's behalf. Such persons or entities described in this paragraph are not Trading Partners under this Agreement.

4. Obligations and Activities of Business Associate:

- (a) Business Associate shall not use or disclose PHI in any manner that would constitute a violation of 45 C.F.R. Parts 160 and 164 if used or disclosed by Business Associate.
- (b) Business Associate shall not use or further disclose PHI other than as permitted or required by this Agreement or as Required By Law.
- (c) Business Associate shall use appropriate safeguards to prevent use or disclosure of the PHI other than as provided for by this Agreement.
- (d) Business Associate shall mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement.
- (e) Business Associate shall provide notice to Covered Entity as required by and in accordance with Section 5 of this Agreement.
- (f) In accordance with Section 3 of this Agreement, Business Associate shall disclose PHI to those Trading Partners that may be assisting Business Associate in carrying out Business Associate's, the Plan Sponsor's, or the Plan's functions.
- (g) Business Associate shall provide access, at the request of the Covered Entity, to PHI in a Designated Record Set during Business Associate's normal business hours to the Covered Entity or to an Individual in order to meet the requirements under 45 CFR 164.524. If the Covered Entity determines that access to the Individual's PHI can only be accommodated through Business Associate, Business Associate shall accommodate the request in accordance with its internal procedures for handling such a request. In the event an Individual contacts Business Associate directly about accessing PHI, Business Associate shall follow its internal procedures for handling such a request. In the event Business Associate is asked to provide copies of an Individual's PHI, Business Associate shall provide such access by mailing a copy of the PHI in a Designated Record Set to the address given by the Individual, unless otherwise directed by the Covered Entity.
- (h) Business Associate agrees to make any amendment to PHI in a Designated Record Set as directed by the Covered Entity, in accordance with 45 CFR 164.526. In the event an Individual contacts Business Associate directly about making amendments to PHI, Business Associate shall follow its internal procedures for handling such a request.
- (i) Business Associate agrees to make internal practices, books, and records, including policies and procedures and PHI relating to the use and disclosure of PHI received from, or created or received by the Covered Entity or on behalf of the Covered Entity, or at the request of the Secretary or designated by the Secretary, during Business Associate's normal business hours for purposes of the Secretary determining the Covered Entity's compliance with the Privacy Rule.
- (j) Business Associate shall document such disclosures of PHI and information related to such disclosures as would be required for the Covered Entity to respond to a request by an Individual for an accounting of disclosures of PHI in

accordance with 45 CFR 164.528. Business Associate shall, at the request of the Covered Entity, provide to the Covered Entity information collected in accordance with this provision of the Agreement, to permit the Covered Entity to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 CFR 164.528. In the event an Individual contacts Business Associate directly about obtaining an accounting of disclosures of PHI in accordance with 45 CFR 164.528, Business Associate shall follow its internal procedures for handling such a request.

- (k) Business Associate, including its Trading Partners, shall implement administrative, physical and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of electronic PHI that it creates, receives, maintains or transmits on behalf of Covered Entity, as required by 45 CFR 164.314, as amended from time to time.

5. Breach Notification:

- (a) Business Associate agrees to notify Covered Entity no later than sixty (60) calendar days following the discovery of any unauthorized acquisition, access, use or disclosure of unsecured PHI which compromises the security or privacy of PHI and poses a significant risk of financial, reputational or other harm to the Individual (a "Potential Breach"). Upon notification by Business Associate, Covered Entity shall perform a risk assessment to determine whether the Potential Breach constitutes a Breach as defined in 45 C.F.R. 164.402. For purposes of this Section 5, "Potential Breach" shall not include:
 - i. any unintentional acquisition, access, or use of PHI by a workforce member or person acting under the authority of Business Associate, if such acquisition, access, or use was made in good faith and within the scope of authority and does not result in further use or disclosure in a manner not permitted under subpart E of HIPAA;
 - ii. any inadvertent disclosure by a person who is authorized to access PHI at Business Associate to another person authorized to access PHI at Business Associate; or
 - iii. a disclosure of PHI in which Business Associate has a good faith belief that an unauthorized person to whom the disclosure was made would not reasonably have been able to retain such information.
- (b) Business Associate agrees to cooperate fully with Covered Entity in any investigation and risk assessment of any Potential Breach.
- (c) A Potential Breach is considered discovered as of the first day on which the unauthorized acquisition, access, use or disclosure of the unsecured PHI was known by Business Associate, or by exercising reasonable diligence, would have been known by Business Associate, or the first day Business Associate is notified by any Trading Partner of a Potential Breach.
- (d) The notice to Covered Entity shall include, to the extent possible, :
 - i. The identification of each Individual whose unsecured PHI has been, or is reasonably believed by Business Associate to have been, accessed, acquired, or disclosed during the Potential Breach;
 - ii. A description of the types of unsecured PHI that Business Associate believes may have been involved in the Potential Breach (such as whether the Individuals' full name, social security number, date of birth, home address, account number, diagnosis, disability code, or other types of information were involved); and

- iii. A brief description of what happened, including the date of the Potential Breach and the date the Potential Breach was discovered.
- (e) To the extent the following information is available to Business Associate, Business Associate shall also provide Covered Entity with the following information in the notification to Covered Entity, or as it becomes available:
 - i. Any steps Business Associate believes that Individuals should take to protect themselves from potential harm resulting from the Potential Breach; and
 - ii. A brief description of what Business Associate is doing to investigate the Potential Breach, to mitigate harm to the Individuals, and to protect against any further Potential Breaches.

At the request of the Covered Entity, Business Associate will consider providing contact procedures for Individuals to ask questions or learn additional information, which shall include a toll-free telephone number, an e-mail address, Web site, or postal address.

- (f) In the event that a Law Enforcement Official (as defined in 45 C.F.R. 164.103) states to Business Associate that notification to Covered Entity would impede a criminal investigation or cause damage to national security, Business Associate shall delay the notification to Covered Entity as specified by the Law Enforcement Official. Business Associate shall provide Covered Entity with a written statement from the Law Enforcement Official or, if the statement was oral, documentation of the statement made by the Law Enforcement Official, as soon as possible after the statement was made to Business Associate.
- (g) In the event that Business Associate fails to notify Covered Entity of a Breach, as defined in 45 C.F.R. 164.402, Business Associate shall indemnify and hold Covered Entity harmless from any and all liability, damages, costs (including reasonable attorneys' fees and costs) and expenses imposed upon or asserted against Covered Entity arising out of Business Associate's failure to timely notify Covered Entity of any Breach. This Section shall survive termination of this Agreement.
- (h) Business Associate shall educate its employees, directors and officers as necessary and appropriate, regarding compliance with its internal HIPAA and HITECH policies and procedures and the importance of the notification requirements of this Section 5 of the Agreement.

6. Permitted Uses by Business Associate: Business Associate shall use and disclose PHI only to the extent necessary to perform the Services and to assist Trading Partners in performing their services, and in a manner that such use and disclosure would not violate the Privacy Rule if done by Business Associate, provided, however, that:

- (a) Business Associate may use PHI in its possession for the proper management and administration of Business Associate's operations or to carry out the legal responsibilities of Business Associate.
- (b) Business Associate may disclose PHI in its possession for the proper management and administration of Business Associate, provided that disclosures are required by law or addressed in this Agreement.
- (c) Business Associate may use PHI to provide Data Aggregation services to Covered Entity as permitted by 42 CFR 164.504(e)(2)(I)(B).

7. Obligations of the Covered Entity:

- (a) Covered Entity shall allow Business Associate access to PHI of Individuals utilizing the Services through the Covered Entity.
- (b) Covered Entity shall provide Business Associate with the Notice of Privacy Practices that the Covered Entity produces in accordance with 45 CFR 164.520, as well as any changes or modifications to such notice.
- (c) Covered Entity shall provide Business Associate with any changes in, or revocation of, permission by an Individual to use or disclose such Individual's PHI, if such changes affect Business Associate's permitted or required uses and disclosures.
- (d) Covered Entity shall notify Business Associate of any restriction to the use or disclosure of PHI that the Covered Entity has agreed to in accordance with 45 CFR 164.522.
- (e) Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under HIPAA and/or HITECH if done by the Covered Entity, provided, however, that the Covered Entity may request that Business Associate use or disclose PHI for data aggregation or management and the administrative activities of Business Associate.

8. Return of Protected Health Information: At termination of this Agreement, if feasible, Business Associate shall return or destroy all PHI created or received by Business Associate on behalf of the Covered Entity. In the event that Business Associate determines that returning or destroying the PHI is not feasible, Business Associate shall extend the protections of this Agreement to such PHI and limit further uses and disclosures of such PHI to those purposes that make the return or destruction of the information infeasible.

9. Termination:

- (a) This Agreement shall terminate when the then current Benefit Management Agreement between the parties terminates, unless terminated earlier in accordance with paragraph (b) of this Section 9.
- (b) Notwithstanding any other provision of this Agreement, the Covered Entity may immediately terminate this Agreement if Business Associate has materially violated its responsibilities regarding PHI under this Agreement and has failed to provide satisfactory assurances to the Covered Entity within a specified period of time that the violation has been cured and steps taken to prevent its recurrence.

10. Miscellaneous:

- (a) This Agreement may be executed in one or more counterparts. Each counterpart shall be deemed an original. In addition, an executed copy of this Agreement shall be as valid as the original.
- (b) Business Associate agrees to indemnify, defend and hold Covered Entity its officers, directors, and employees harmless from any alleged claim or penalty against Covered Entity or the Plan Sponsor arising from any allegation of uses and/or disclosures of Protected Health Information in violation of 45 C.F.R. Parts 160 and 164 arising from an alleged use or disclosure of Protected Health Information by Business Associate or its agents or subcontractors.

Covered Entity agrees to indemnify, defend and hold Business Associate and its officers, directors, and employees, harmless from any alleged claim or penalty

against Business Associate arising from any allegation of uses and/or disclosures of Protected Health Information in violation of 45 C.F.R. Parts 160 and 164 arising from an alleged use or disclosure of Protected Health Information by Covered Entity or the Plan Sponsor.

- (c) To the extent that any provision of this Agreement is in conflict with any law, regulation, rule or administrative policy of any government entity, this Agreement will have been deemed to have been amended in order to bring it into conformity with these provisions. In addition, the parties agree to amend this Agreement, as appropriate, to conform with any new or revised law or regulation to which either party becomes subject, including, but not limited to, the Standards for Electronic Transactions, 45 CFR Parts 160 and 162 and the Health Insurance Reform: Security Standards 45 CFR Parts 160, 162 and 164.
- (d) Except as stated in paragraph (c) of this Section 10, this Agreement may be amended only in a written document signed by the duly authorized officers of both parties.
- (e) This Agreement will be executed, delivered, integrated, construed and enforced pursuant to and in accordance with the laws of the State of Tennessee.
- (f) This Agreement may not be assigned by either party without the prior written consent of the other party. Except for the prohibition on assignment contained in the preceding sentence, this Agreement shall be binding upon and inure to the benefits of the heirs, successors, and assigns of the parties hereto.
- (g) The waiver by either party of a breach or a violation of this Agreement shall not operate as, or be construed to be, a waiver of any subsequent breach of same or other provisions hereof. No waiver shall be effective against any party hereto unless in writing signed by that party.
- (h) All notices, requests, demands, approvals, and other communications required or permitted by this Agreement shall be in writing and sent by either certified mail or by personal delivery. Such notice shall be deemed given on any date of delivery by the United States Postal Service. Any notice shall be sent to the addresses set forth below.
- (i) If any provision of this Agreement is held invalid, the remainder of this Agreement shall not be affected unless the invalid provision substantially impairs the benefits of the remaining provisions of this Agreement.
- (j) The responsibilities of the parties under this Agreement shall survive the termination of this Agreement.
- (k) The Covered Entity and Business Associate each ratifies and confirms the terms and conditions of this Agreement, and agree that such shall remain in full force and effect unless otherwise terminated or amended at a later date.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the date first referenced above.

PLAN ADMINISTRATOR

City of Franklin
109 3rd Ave. South
Franklin, Tennessee 37064

By: _____
Authorized Representative of Plan Administrator

Printed Name

PLAN SPONSOR

City of Franklin
109 3rd Ave. South
Franklin, Tennessee 37064

By: _____
Authorized Representative of Plan Sponsor

Printed Name

BUSINESS ASSOCIATE

SHERRILL MORGAN
525 West Fifth Street, Suite 310
Covington, KY 41011

By: _____
Authorized Representative of Business Associate

Lisa Stamm, Esq.
Printed Name

APPROVED AS TO FORM
by City Attorney's Office

By: Shanna R. Bellinger
Date: September 5, 2013