

Tufts Acceptable NDA Procedures
FOR DRAFTERS
3/23/2016

At times it is necessary to accept the confidential information of a third party for the purposes of exploring or entering into a potential collaboration, license or other such contractual arrangement. Please consider the guidelines below when drafting, reviewing, or entering into any confidentiality agreement.

Before Drafting:

- The parties should discuss the general nature of the confidential information and assess how necessary the exchange of such information would be to assessing or entering into a future collaboration or license. When possible, the discussion, collaboration and/or license should proceed without the sharing of confidential information of the parties.
- When it is deemed necessary to enter into confidential discussions, the Tufts faculty and staff should use the **Tufts NDA template** attached hereto and the following principles as a guide; questions should be directed to the Tufts University Office for Technology Transfer and Industry Collaboration or the Office of University Counsel

When Drafting and Reviewing:

- Parties:
 - In most cases, the parties to the NDA should be Tufts University and the other company or institution – **not individual persons**. Listing Tufts as the party allows the University to protect you from personal liability.
- Term and governing law:
 - The NDA should cover information disclosed **only during the term of the agreement** (1-2 years) and for the defined “Purpose” – not before or after
 - Tufts can agree to keep information confidential for 3-5 years optimally, but for no more than 7 years
 - Governing law should be Massachusetts or remain silent. Other jurisdictions requested by third parties should be on an approved list by University Counsel or on a case by case basis.
- Definition or Scope of Confidential Information:
 - **Should** include:
 - Anything labeled confidential
 - If disclosed orally, should be reduced to writing and marked confidential
 - Information related to the defined Purpose
 - **Should not** include:
 - Trade secrets (these require an indefinite term of confidentiality)
 - Anything already in the possession of Recipient
 - Anything that is or becomes public knowledge
 - Anything obtained from a third party lawfully in possession of the information and not under a duty of confidentiality to the disclosing party
 - Anything independently developed by the recipient
 - Exception should be given for a court order, provided the recipient informs the discloser and assists in obtaining protection
- Use and Publication:

- Should be limited to use for the purpose described in the agreement; any use of Confidential Information for another purpose should not be authorized
 - Try to keep the purpose defined as narrowly as possible
- **For NDA provisions in another type of agreement** (SRA, license – but not a generic NDA/CDA), it is acceptable to allow the other party to use Confidential Information for internal research and development purposes
- Publication: Under no circumstances should confidential information be published without the consent of the disclosing party. This is a direct breach of the agreement.
- Intellectual Property:
 - If the parties agree to perform work or enter into a project or relationship as a result of discussions performed under a non-disclosure agreement, **a new agreement must be created** to govern that work and lay out intellectual property rights between the parties. Please contact the Office for Technology Transfer and Industry Collaboration for guidance.
 - The party receiving confidential information may not use the confidential information in any patent filings without permission from the disclosing party
- Typical Remedies for Breach:
 - Breach **may** cause irreparable damage (not “will cause”)
 - The injured party is entitled to **seek** injunctive relief (not “entitled to injunctive relief”)
 - If there is an indemnification clause, either remove it or make it mutual to cover possible harmful disclosures by the other party

Executing the Agreement

- **Only authorized signatories for Tufts can sign confidentiality agreements.** Please ensure that you are authorized to sign a non-disclosure agreement to bind Tufts before sending a signed document back to your collaborator.
- Once you have completed drafting or reviewing, please ensure that either the Office for Technology Transfer and Industry Collaboration, The Office of University Counsel, or the Office of Research Administration is aware of the agreement and has been given an opportunity to comment.
- Upon obtaining a fully-executed agreement, please send a copy to either the Office for Technology Transfer and Industry Collaboration, The Office of University Counsel, or the Office of Research Administration for filing.

Maintaining the Obligation of Confidentiality:

- Storage, Maintenance, and Disposal
 - **Students:** Faculty receiving confidential information should make every effort to prevent the receipt and use of confidential information by undergraduate and graduate students. This is because the restrictions on the use of that information could hinder publication of research, which adversely affects their academic progression. Additionally, students are transient entities and may leave the University, but will take their confidential knowledge with them: there is no way to control how students will use this knowledge after they leave. When necessary, students who are given access to confidential information as part of a project should be made aware of their obligation of confidentiality and the serious consequences of disclosure. They should also be advised as to any potential restrictions on publication that could adversely affect their academic career and be given the option of working on such project or not.

- **Storage & Maintenance:** Recipient must store Confidential Information in a secure (locked or password protected) location where others who do not have an obligation of confidentiality cannot access it. Recipient should be careful not to discuss the Confidential Information in public places, or in a location where others who do not have an obligation of confidentiality may overhear the conversation. Recipient is obligated to treat the Confidential Information at least as carefully as it would treat its own confidential matters, and under no circumstances with less than a reasonable degree of care (in other words, with less care than an average person would treat important, secret information).
- **Disposal:** Upon termination of a project involving confidential information, the confidential material should be destroyed, deleted (and deleted from the trash bin on your computer or e-mail program), and/or returned to the disclosing party, in accordance with its request.

Tufts University Two-Way Non-Disclosure Agreement

This Agreement is dated as of [date] the (the “Effective Date”) by and between Trustees of Tufts College having an address at 136 Harrison Avenue, Boston, Massachusetts 02111 (“Tufts”) and [company] having an address at [address] (“Company”); hereinafter collectively referred to as the “Parties”.

In consideration for the exchange and evaluation of certain Information (as defined below) provided by Tufts through [investigator] and others, and certain Information relating to [information], the Parties hereby agree as follows:

1. For purposes of this Agreement, the term “Information” shall mean all knowledge, data, know-how, samples, software, technical and non-technical materials, or specification, which are confidential and proprietary, provided by the Parties pursuant to this Agreement. Any Information that is disclosed in oral form shall be confirmed in written summary form within thirty (30) days of disclosure.

2. The Parties agree to maintain in confidence the Information with the same degree of care they hold their own confidential and proprietary information. The Parties will not use the Information except for the evaluation pursuant to this Agreement. Each Party will disclose the Information only to its officers and employees directly concerned with the evaluation of the Information, and the Parties will not disclose the Information to any third party nor will the Parties use the Information for any other purpose.

3. Samples of material may be furnished to the Parties in connection with the evaluation hereunder; the Parties agree to use such samples only for its evaluation, to keep confidential the results of any tests conducted on such samples and to return or destroy any remaining portion of such samples at the conclusion of its evaluation.

4. The preceding obligations of the Parties of non-disclosure and the limitation upon the right to use the Information (including samples and test results) shall not apply to the extent that the receiving Party can demonstrate by suitable physical evidence that the Information:

- (a) was in the possession or control of the receiving Party prior to the time of disclosure hereunder; or
- (b) was independently developed by employees of the receiving Party or its affiliated companies, who had no knowledge of the Information; or
- (c) at the time of disclosure was, or thereafter becomes, public knowledge through no fault or omission of the receiving Party; or
- (d) was lawfully obtained by the receiving Party from a third party under no obligation of confidentiality to the disclosing Party; or
- (e) is required to be produced pursuant to a requirement of applicable law or an order of a court of competent jurisdiction, provided that the receiving Party (i) promptly notifies the disclosing Party and (ii) reasonably cooperates, at the disclosing

Party's expense, with the disclosing Party's efforts to contest or limit the scope of such disclosure.

5. Subject to the provisions of Paragraph 4 hereof, all proprietary rights (including but not limited to patent rights) in and to the Information shall remain the property of the disclosing Party.

6. THE PARTIES EXPRESSLY DISCLAIM ANY AND ALL IMPLIED OR EXPRESS WARRANTIES AND MAKES NO EXPRESS OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE OF THE INFORMATION SUPPLIED PURSUANT TO THIS AGREEMENT. Further neither Tufts nor Company has made any investigation and makes no representation that the Information is free from liability for patent infringement.

7. The Information being disclosed by the Parties pursuant to the Agreement is with the express understanding that neither Party will be obligated to enter into any further agreement relating to the Information, and nothing in this Agreement shall be construed as granting any license to either Party.

8. This Agreement shall expire one (1) year from the Effective Date. All obligations of the Parties under this Agreement shall terminate five (5) years from the Effective Date.

9. This Agreement sets forth the entire agreement among the parties as to the subject matter hereof, and none of the terms of this Agreement shall be amended or modified except in writing, signed by the parties.

10. This Agreement shall be governed exclusively by, and construed and interpreted under the law of the Commonwealth of Massachusetts, without reference to conflict of law principles.

The parties hereto have duly executed this Agreement as of the Effective Date.

COMPANY

TRUSTEES OF TUFTS COLLEGE

By: _____
Name:

By: _____
Name:

Date: _____

Date: _____