Legal Guide to Administrative Data Sharing for Economic and Workforce Development

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STATE DATA
SHARING INITIATIVE

CREC CENTER FOR REGIONAL ECONOMIC COMPETITIVENESS

LEGAL GUIDE TO ADMINISTRATIVE DATA SHARING FOR ECONOMIC AND WORKFORCE DEVELOPMENT

Frequently Asked Questions (FAQs)

To meet increasing demands for oversight from citizens and legislatures, state economic and workforce development practitioners must conduct rigorous research and evaluation efforts to validate and improve the performance of their programs. Data for these activities can be difficult and costly to acquire. If made available, administrative data, in the form of wage records (gathered for unemployment insurance purposes) or tax filings, could be used to improve program evaluation efforts that offer ideas that could be used to make programs more effective and provide taxpayers with greater value. Federal laws, such as Title 26 of the Internal Revenue Code or the Confidential Information Protection and Statistical Efficiency Act, ("CIPSEA") operate in concert with a litany of state laws (see http://statedatasharing.org/better-access/), to limit the release and use of administrative records, but often allow for their use for critical government functions. Using administrative data for policy analysis and evaluation aids good governance. Data sharing among sister agencies enables programmatic review and evaluation that can validate the effectiveness of state government programs or suggest areas that may be ineffective, mismanaged, abused, or outdated. Therefore, it is incumbent upon data-holding agencies, data-requesting agencies, and their legal counsel to facilitate responsible administrative data sharing within the spirit and intent of the legislation.

1. What is the purpose of this guide on administrative data sharing?

Data sharing involves legal and regulatory context that must be incorporated into each state's effort to share data. Legal counsel face key questions in determining whether and how data may be used for policy making. This guide sets out practices that we have identified through our research that facilitate the responsible use of administrative data for evidence-based policy making to the full extent of federal and state laws. It identifies common issues to consider when negotiating an agreement to securely share data.

The executive level of state governments can refer to this guide to help those responsible for program development and operation better understand the underlying issues and the parameters that existing laws place on data sharing. The guide cannot answer every legal question, but the goal is to provide a general framework for determining how to say "yes" to data sharing in a way that protects privacy and confidentiality while making the data useful to inform decision makers.

2. Why is administrative data sharing so important today for policy making?

Sharing administrative data allows state officials to measure the effectiveness of economic development programs, particularly those that provide incentives from public funds to private enterprises in

exchange for promised job creation and investment. More longitudinal data sharing will enable public agencies to conduct important analysis of education and workforce training programs to determine whether academic and competency goals have been achieved as planned. State agencies are being required to demonstrate greater accountability with taxpayer dollars, and data sharing is an approach to support more rigorous analysis in a more cost-effective way.

The formation of the Commission on Evidence-Based Policymaking (CEP) at the national level illustrates this trend. Established by Congressional leaders in 2016, the CEP developed a strategy for increasing the availability and use of federal data to build evidence about government programs, while protecting privacy and confidentiality. The CEP issued its report in September 2017, calling for changes to the Confidential Information Protection and Statistical Efficiency Act (CIPSEA), a federal law enacted in 2002 as Title V of the E-Government Act of 2002 (Pub.L. 107–347, 116 Stat. 2899, 44 U.S.C. § 101), that allows wage records created for the unemployment insurance system to be used for statistical and evaluation purposes. The proposed changes encompassed in H.R.4174 — Foundations for Evidence-Based Policymaking Act of 2017, passed by the House of Representatives in November 2017 — would provide clearer direction to allow for these data to be used for program evaluation purposes.

States can review the federal changes proposed in Commission on Evidence-based Policy report and select aspects to include into their state policies that allow agencies to share administrative records with one another for policy analysis and evaluation purposes. The recent Federal legislative proposals build on earlier work at the state level. For instance, the Pew Charitable Trust published a May 2017 report, "How States Are Improving Tax Incentives for Jobs and Growth: A National Assessment of Evaluation Practices" (www.pewtrusts.org/taxincentives) that highlights (1) the need for high-quality information about the results of tax incentives and (2) recent progress in many states toward generating such information.

For instance, in 2016, Maryland conducted an extensive assessment of 12 of their tax incentive programs, including their enterprise zone and "Sunny Day" fund. Based on the analysis, the Governor proposed legislation in 2017 and 2018 to re-imagine the criteria for making incentive investments to provide an advantage for traditionally disadvantaged rural or disinvested communities. In 2017, Oklahoma completed an evaluation of 12 tax credits using tax record data from the Department of Revenue. Among the credits included several related 'quality jobs' tax credit programs. An appointed Incentives Evaluation Commission recommended retaining several of these programs while repealing the High Impact Quality Jobs because the data suggested it needed to be reconfigured to work as intended.

3. What data are likely to be the focus of data sharing for economic and workforce development purposes and why?

Policy makers seek answers to many questions about how effective public investments in incentives are, and access to administrative data has the potential to improve the quality of evaluation research that will help answer those questions. Wage records provide job creation and payroll data while

corporate tax records provide total (and sometimes detailed) deductions taken for new investments. Wage records provide the best quality longitudinal data about individuals hired and the wages they received. Corporate tax data provides the most reliable source available for deductions taken for tax incentives as well as expenses associated with certain types of investments (an important measure that economic developers often use in determining the impact of public incentives).

Many states use tax incentives (such as credits, deductions, and exemptions) to recruit company locations and expansions. Wage records can be invaluable in determining whether tax incentive recipient created the new jobs promised or whether individuals' wages increased. In this context, UI wage records include a complete count of payroll employment in a state. First, the workers in the records can be identified individually and tracked over time. The records include wages paid at different points in time and allows analysts to assess the impact of business incentives on the firm's workers by tracking actual new jobs created after the incentive award, a critical data point in monitoring program compliance.

South Carolina recently introduced legislation to monitor hours worked and the occupation of workers. This additional information will allow policy makers to better assess which types of workers are benefiting – in what occupation and whether they are full or part-time workers. Currently, companies provide these data upon request, but the information can only be validated through signed attestations from employers.

In addition, many states tax incentive programs provide benefits to companies that make certain investments. The only way to know whether the incentive is taken – and therefore potentially had the intended impact is to know whether the company used the incentive. Corporate tax records have information about deductions that the company takes, including any economic development inducements. By combining individual tax filings to determine the level of deduction sought with unemployment insurance data on employment and wage counts can help assess the impact of a tax incentive program.

These data can be used not only for tax incentives but also all financial incentives (including cash awards or reimbursements) to ensure the offered incentives are achieving the desired results. In that way, policymakers can evaluate the effectiveness of these programs, address any flaws, and modify them according to actual rather than perceived or touted experience.

In Pew's work to promote increased state efforts to evaluate economic development programs, 10 states had achieved the status of "leaders in tax incentive evaluation." This requires well-designed regular reviews, quality evaluations, and a process for informing policy decisions. These rigorous measures of the economic impacts of incentives provide decision makers with realistic and reliable information — good, bad, or indifferent — on the effectiveness of their incentive awards. If decision makers have access to actionable data they can change or eliminate programs based on actual experience with recipients, thus making the programs more effective for continued use. For instance, reviews of the Michigan Economic Growth Authority tax credits[1] determined that the program did not

[1] Timothy J. Bartik and George A. Erickcek, "The Employment and Fiscal Effects of Michigan's MEGA Tax Credit Program," W.E. Upjohn Institute, Upjohn Institute Working Paper No. 10-164, 2010.

generate sufficient economic and fiscal benefits, so the program was discontinued. At the same time, an assessment of the Minnesota Angel Tax Credit program[2] demonstrated that about 82 percent of the projects would not have achieved the investment level they did without the credit and nearly half would have attracted no investments at all. This review helped to reinforce the value of the program and to provide ideas about how to improve the performance for a program that continues today.

As the report noted, "Evaluating incentives well takes time, effort, and persistence. The payoff, though, is worth it: Policymakers have the information they need to ensure that economic development tax incentives achieve strong results for states' budgets, businesses, and workers." If the incentive policies are intended to attract companies offering substantial numbers of jobs at certain wage levels, states must ensure that the expenditures were validated by the desired increase in wages and tax revenues.

For economic development or tax incentive programs, for instance, companies are often required to demonstrate that they have created a certain number of jobs or jobs that pay a pre-determined average wage. In some programs, companies may be required to demonstrate that they have made an investment that is necessary for company operations. For workforce development programs, federal and state goals require the training to improve worker income after the program has been delivered. Adequate measurement of the impact of incentive awards and programs on the state's budget and economy requires some analysis of the extent to which state programs affect company or individual behaviors. Evaluators should not assume the existence of a causal connection (i.e., incentives produce a positive location decision and the resulting job and revenue creation); rather, they should conduct objective, fact-based evaluations of the extent of the impact on corporate decisions.

Quality data for these types of analysis are difficult to obtain. Often, states rely on surveys that are difficult to validate, and they can be expensive to taxpayers and burdensome to program recipients. To evaluate whether budgeted programs or tax incentives designed to promote economic or workforce development programs are having the intended impact, administrative data may be an excellent third-party verified data source that helps to make evaluation efforts much more cost-effective.

4. We need to obtain data sets from a sister agency of state government. How should we begin?

Administrative data are housed in state agencies that result from transactions that the state does with business and individual taxpayers. The data steward (or data holding) agency rarely cites data sharing as an important organizational priority. As a result, data are not necessarily "curated" so that they are readily available for evaluation or analytic purposes. Different state agencies each have their own data governance policies and procedures.

The first step in this process is to understand what data are collected during these transactions, how they are structured, and how they are stored. In addition, it is important to appreciate the agency's data policies, purposes, and procedures. This means understanding the characteristics and limita-

[2] Economic Development Research Group, Inc., and Karl F. Seidman Consulting Services, "Evaluation of the Minnesota Angel Tax Credit Program: 2010-2012, prepared for Minnesota Department of Revenue, January 2014.

tions of the data being held. It also means that the requesting entity must understand the process for requesting and accessing data, even when no formally documented process may exist.

Thus, the data user might develop a 'use case' (or research agenda) that demonstrates a clear rationale for data use that benefits the data steward agency, the requesting agency, and the taxpayer (i.e., the subject of the data). See Figure 1. A use case can demonstrate a thorough understanding of the requested data, including its capabilities and limits, as well as a commitment to maintaining the privacy and security of any data or analysis generated. The request should limit a request to the portion of the data set that can be clearly tied to the use case and avoid requesting more data than necessary to conduct the necessary analysis.

FIGURE 1: **SAMPLE MOU LANGUAGE #1 FOR A THREE-PARTY AGREEMENT**

This MEMORANDUM OF UNDERSTANDING ("MOU") is between the NAME OF AGENCY HOLDING THE DATA ("DATA STEWARD"), the NAME OF THE AGENCY MANAGING AND ANALYZING THE DATA ("DATA INTERMEDIARY"), and the AGENCY USING THE DATA ("DATA USER"), governing disclosure and re-disclosure of confidential individual quarterly employment wage and industry information and claim and demographic information ("CONFIDENTIAL INFORMATION") maintained by DATA STEWARD and provided to DATA INTERMEDIARY to develop, implement, and maintain the common follow-up information management system ("ACTIVITY") for matching with DATA USER program participants for studying employment and wage outcomes of individuals receiving benefits ["PURPOSE1"] from DATA USER and assessing the economic impact of the DATA USER programs ["PURPOSE2"].

If data sharing or an evaluation approach is explicitly required by law, then the case for accessing administrative data may be relatively easy to make, i.e., the legislature requires it (Sample MOU Language #2). But in most cases, the use case will need to be more nuanced. From a legal standpoint, the user must demonstrate a compelling use case, because it is very easy for data holding agencies to simply say that they cannot share the data – either for legal, staffing, or cost reasons.

FIGURE 2: **SAMPLE MOU LANGUAGE #2 FOR AUTHORIZATION TO SHARE DATA**

DATA USER seeks Confidential Information on past, current, and future program participants in order to meet State reporting and evaluation requirements for DATA USER's agency as mandated by the Governor and the State Legislature; for federally mandated reporting requirements including the Workforce Innovation and Opportunity Act ("WIOA") of 2014, the Consolidated Annual Report for Carl D. Perkins Career and Technical Education ("CTE") Act of 2006, federal grants requiring outcomes, and state grants. Other federal, state and private grants or projects requiring "Confidential Information" to meet their outcomes may be added at the agreement of all parties.

Sections 603.10(a)(1) and 603.10(a)(2) of Title 20 of the Code of Federal Regulations require a state unemployment compensation agency disclosing Confidential Information to a public official or the agent or contractor of a public official to enter into an agreement with the public official. DATA INTERMEDIARY will provide Confidential Information to DATA USER for the purposes stated in this MOU.

5. Upon requesting data from another agency, we were told it was illegal to release the information. Now what?

Rarely may a data holding agency prevent data sharing for every purpose, so the data holder may make a blanket rejection for some other reason. Often, the data holder may be making the decision without all the facts about the legal framework that oversees their duty as data stewards. The key issue is whether a request meets key conditions in applicable federal or state law. Often, the biggest challenge is that representatives of data holding agencies are unfamiliar with the federal or state laws, and they operate as though data sharing is not allowed based on historical legacy rather than legal standing. It is important to keep in mind that data holders rarely provide their staff with formal training on the legal parameters for data sharing and have little incentive to do so.

At this point, the key strategy should focus on educating state staff about the laws and regulations. As that alone may not be sufficient, however, it is also vital to persuade those staff that their agency stands to benefit from data sharing. These benefits could be in answering questions of their own, improving the quality of their own data, or receiving credit for helping taxpayers benefit from more informed decision making based on the data they provide. One easy to access resource on the legal constraints governing data sharing is the state-by-state guide on data sharing legislation found at www.statedatasharing.org.

6. Which federal and state laws apply to data sharing, and how do we learn more?

Different datasets are governed by different laws. For instance, wage records, created for the unemployment insurance system, result from a federal-state partnership in which states collect the data using federal funds. State unemployment data are integral to verification of employment and wage levels because the data are gathered when companies submit their payroll records to appropriate state taxing authorities. For instance, companies applying for a discretionary job training program are required to demonstrate that their workers benefit through improved wages after the company receives the benefit. Rather than asking the company for wage information as part of the application, the economic development agency could simply get the tax identification numbers for the individuals expected to benefit. Then, after the tax credit or training has been provided, they could revisit the company's payroll tax filing several months later to verify that the workers' wages improved as promised. This has the benefit of being less burdensome to employers because they already file wage record returns, and it is useful to the administering agency because the data is verified through regular unemployment insurance monitoring systems and wage record audits.

In addition, states that provide tax incentives need access to corporate tax records to verify whether the company used the tax incentives when they filed their return and at what level. The Internal Revenue Code 26 U.S.C. § 6103 is most relevant, with companion state confidentiality regulations applying where appropriate.

a. State unemployment data are subject to the Confidential Information Protection and Statistical Efficiency Act applies along with companion state legislation that can sometimes be even

more restrictive than CIPSEA. Changes to CIPSEA were proposed in the H.R. 4174 (passed by the House in November 2017 and referred to committee by the Senate the same month). CIPSEA is implemented through federal regulation (20 CFR § 603.5). The law includes provisions for the secure release to authorized recipients for legally permitted purposes (i.e., to public officials for use in the performance of official duties). In addition, the recipient agency must store and dispose of the protected information in a prescribed manner, and submit to audits to ensure compliance with legal provisions for safeguarding data. Relevant state laws provide some additional parameters associated with data sharing. The language and references for state laws governing the confidentiality of payroll records can be found at www.statedatasharing.org.

b. Corporate tax data are useful in verifying capital investment, project costs, and employment and wages (especially for so-called "1099 workers" that are not formal employees but may receive significant income levels or may receive income through independent, unincorporated business operations). Federal law permits release of these data to Treasury Department employees to prepare "economic or financial forecasts, projections, analyses, and statistical studies and conducting related activities." (26 U.S.C. §6103.) The confidentiality of state tax data is subject to state laws, but state and federal tax data are often comingled (especially when companies file electronically), subjecting the state tax data to federal confidentiality requirements. The language and references for these state laws governing the confidentiality of state tax records can be found at www.statedatasharing.org.

c. Additional confidence in data sharing may be achieved if states were to require companies receiving assistance (in the form of incentives or program subsidies) to execute waivers authorizing the release of payroll records submitted for unemployment insurance or tax records in exchange for accessing incentives. Such a waiver may not itself be sufficient to authorize an agency to release that data without the appropriate safeguards and assurances that only authorized persons will be able to access the data. It does, however, serve as additional authority and evidence of willingness to be transparent by both the company and the agency granting incentives.

7. How do we ascertain whether our agency and its officials fall within the exceptions to the prohibition against data release?

Determining whether your agency has authority to use data from other agencies requires a review of applicable statutes, regulations, and practices. You should determine whether the law establishes specific prohibitions in data sharing (e.g., to protect privacy) and whether there are exceptions to these prohibitions. Other sources of authority may stem from a federal requirement or other regulations.

Key to this review is understanding the motivation, especially the reasons and purposes, for maintaining data confidentiality. The review process also helps to identify areas where specific authority to access the data may be needed or helpful. A regulatory review can also be effective and used as

a potential (easier) substitute for legislative action. This may also provide "cover" in the absence of a legislative prohibition.

8. We have discovered that, although the law permits the release of the data sets we need under set circumstances, the agency replied that it is not customary to release it. That is, they have never done it before and believe they cannot. How can we address this?

While privacy and confidentiality laws establish limits around administrative data sharing —especially when personally identifiable information is involved — many laws allow some data to be shared for specified purposes, such as research and program oversight. In fact, barriers to data sharing are frequently cultural rather than legal, and states can "get to yes" with well-defined purposes and a clear description of what data are needed and who will be securely handling the information. Initial requests for data to enable program evaluations are frequently rebuffed with a simple, "We are not allowed to do that." However, in many states, a lack of understanding about the actual legal parameters that govern data sharing results in inaccurate presumptions about what is permitted and what is not. Many laws and regulations addressing confidentiality and privacy often allow data to be shared for "authorized purposes."

States participating in the State Data Sharing Initiative (www.statedatasharing.org) found that agency culture surrounding administrative data was a more important inhibitor to access than were legislative restrictions. Agency staff often expressed concern about severe penalties for violating disclosure rules, making it easier to say "no" even in circumstances where careful, specified data sharing may be allowed. Agencies may also have a tradition of data stewardship that emphasizes protecting and keeping data, rather than sharing access. Finally, and possibly most importantly, agencies may fear a loss of control over how the data are used, which might result in negative reports about the agency itself or improper use of data in poor quality research.

There are ways to address these cultural barriers to data sharing:

- Provide clear guidance on data sharing through specific laws or agreements (e.g., memoranda of understanding) identifying who could share, for what purposes, and when the sharing could occur.
- Work to overcome the perception of illegality: data belongs to the state, not individual agency.
- Address specific issues of bureaucratic inertia.
- Create a team to foster widespread ownership and value of the project.
- Help agency leaders and staff understand that (a) sharing data for appropriate purposes and (b) maintaining the highest standards of data confidentiality are not mutually exclusive.
- Seek to provide greater visibility to and more resources for agency efforts to streamline the data sharing process.
- Establish more structured, transparent policies and procedures for reviewing data sharing requests.

- Develop intermediaries within the state (either within government or in trusted university settings) who become experts at the data sharing process and become the go-to resource to help solve the technical challenges associated with sharing restricted data in a private and secure manner that meets the needs of data users seeking to conduct policy analysis or program evaluation.

Following these recommendations will enable greater data access that would improve the quality of analysis that can be performed and help lower the costs of that work for both data producers and users.

9. How do we create and document adequate security provisions to maintain confidentiality of the data provided?

Many essential datasets for policymaking contain private or proprietary information.

Laws like CIPSEA and the IRS code (as well as the Family Educational Rights and Privacy Act [FERPA] governing student records or Health Insurance Portability and Accountability Act [HIPAA] governing medical records) stress limits on by whom and for what purposes Personally Identifiable Information (PII) may be accessed (see Figure 3), but it may not always be necessary to share PII.

FIGURE 3: **SAMPLE MOU LANGUAGE #3 FOR LIMITATIONS FOR USE AND DISCLOSURE**

DATA USER agrees to the following limitations on the access to, disclosure and use of, information provided by DATA INTERMEDIARY:

- Any information provided by DATA INTERMEDIARY may not be duplicated or disseminated to any other parties without prior written permission by DATA STEWARD. Such permission shall not be given unless the re-disclosure is permitted by law and essential to the performance of this MOU.
- DATA USER shall not disclose said information in any manner that would reveal the identity of an individual or employing unit or take other action that may adversely affect identified individuals or employers.
- Data and information reported, collected, maintained, disseminated and analyzed in support of ACTIVITY may not be used by any State or local government agency or entity for purposes of making personal contacts with data subjects. DATA USER shall not use the Confidential Information received under this MOU to make such personal contacts.

The technology exists to manage this issue, primarily through the de-identification of PII, enabling researchers access to administrative data while protecting individuals' privacy. A good resource for how to accomplish this is the paper by Simpson S. Garfinkel, "De-Identification of Personal Information" prepared for NIST in October 2015 (http://dx.doi.org/10.6028/NIST.IR.8053). Despite this technological ability to maintain confidentiality in the pursuit of evidence-based policymaking, concerns remain strong about maintaining privacy and minimizing the risks of data breaches.

Critical to resolving this need for data access is the recognition that a clear legal framework with ethical guidelines can ensure that sharing data for appropriate purposes can be done while maintaining the highest standards of data confidentiality. Important points to cover in this framework include:

- Identification of the data to be shared and legal authority
- Confidentiality provisions within the agreement to address:
    - The statutory or regulatory requirements to maintain confidentiality
    - How data will be supplied and physically stored
    - How access is permitted/restricted (personnel included)
    - Sanctions for improper access, use, or release
    - Record-keeping of disclosures/compliance
- Costs, administration, period of use
- Indemnification

Having this type of framework in place is useful whether required legally or just to provide explicit certainty for all parties. It also helps to establish formalized rather than ad hoc procedures, roles, and responsibilities related to data use. In addition to setting out safeguards for the use and maintenance of data, specific goals for the use and analysis of data (e.g., tracking metrics, engaging in required reporting) can also be set forth (SAMPLE MOU LANGUAGE #4). For economic development agencies, this justification may be to assess the effectiveness of programs and incentives, including the performance of individual companies receiving help to determine collective performance and assess trends. For workforce development agencies, the justification may be for improving the quality and accessibility of counseling, training, and placement services.

FIGURE 4: **SAMPLE MOU LANGUAGE #4: PROTECTING THE CONFIDENTIALITY OF INFORMATION**

DATA USER understands that disclosure and re-disclosure of the Confidential Information is governed by both federal and State law. For example (and not by way of limitation), federal restrictions on this information are contained in 42 U.S.C. § 503, 26 U.S.C. § 3304, and subpart B of 20 C.F.R. Part 603, and the Family Educational Rights and Privacy Acts Statute ("FERPA") against unauthorized access or re-disclosure. State law restrictions are contained in (state statute citations). Pursuant to these requirements, DATA USER (and each person having access to the data by executing a Certification described earlier), covenant as follows, and agree that upon their receipt of any Confidential Information, they are representing that they have complied with and/or have accomplished, and will continue to comply with and accomplish each of the following:

1. Confidential Information will be used only for the purposes authorized by law and only for the purposes specified in this MOU;
2. Access to Confidential Information will be provided only to authorized personnel who are required to perform activity required by this MOU and who need to access it for purposes listed in this MOU, who have executed a confidentiality certification (a Certification") in the form of the attached Attachment B ("Authorized Personnel"). A signed copy of the Certification shall be provided by the individual who signs this MOU;

FIGURE 4 (CONTINUED)

3. DATA USER will take precautions to ensure that only authorized personnel have access to the computer systems in which the Confidential Information is stored;
4. DATA USER will implement safeguards and precautions to ensure that only Authorized Personnel have access to the Confidential Information;
5. DATA USER will ensure that Confidential Information will be stored in a place physically secure from access by unauthorized persons;
6. DATA USER will ensure that Confidential Information in electronic format is stored and processed in such a way that unauthorized persons cannot retrieve the information by means of computer or otherwise gain access to it;
7. DATA USER shall immediately terminate an individual's authorized access upon changes in the individual's job duties that no longer require access, unauthorized access to or use of Confidential Information by the individual, or termination of employment; and
8. DATA USER shall transmit the Confidential Information by a secure method and encrypt all personally identifiable information (PII) during receipt, transmission, storage, maintenance, and use.

10. The legislature is seeking better information about the impact of our workforce and training programs. What administrative data can help to address those questions?

The state's workforce board has authority under federal law (the Workforce Innovation and Opportunity Act [WIOA], 29 U.S.C. § 3111) to monitor performance and make recommendations to the Governor regarding workforce system performance. Furthermore, the Employment and Training Administration identified performance metrics that must be reported in TEGL 16-10 as updated August 23, 2017. The TEGL describes in detail measures related to participants' employment rate and median earnings, credential attainment, and skills improvement, as well as the effectiveness of the workforce system in serving employers. The TEGL also provides explicit details about how to calculate the measures. Unemployment insurance wage records can be particularly helpful in determining participant earnings, rather than relying on surveys of employers or participants.

11. The legislature is now requiring us to report on the efficacy of business incentive programs. How do we proceed? What different types of data might we need?

Determining which measures are most relevant for economic development is a bit trickier than for workforce. There is no overall federal authority tied to measuring economic development performance. However, state leaders have embraced the need to report program outcomes to demonstrate the impact of their efforts, but also need more complete indicators to measure those outcomes. To evaluate these programs, states need to understand three high-level elements:

- The intended metrics against which the programs should be, or can be, evaluated (reflecting the goals as set forth by the legislature if possible.)

- How and where to gain access to data needed to perform the analysis and evaluation.
- Where and by whom the necessary data are collected or maintained.

More insights are available from the Pew Charitable Trusts through their Economic Development Tax Incentives Initiative. Pew provides a fact sheet that helps to answer Questions for Lawmakers to Ask When Designing New Tax Incentives.

Administrative data created from tax records can offer state leaders third-party validated evidence to be used in determining compliance with program requirements, and identify which economic and workforce development programs are likely to produce the greatest benefits for the state's economy, workers, and communities. Often, job creation and investment or training performance measures alone do not sufficiently convey how these efforts contribute to the betterment of communities. The appropriate metrics depend on leadership's priorities, local/regional characteristics and needs, and a wide variety of program goals.

For economic development, a more complete listing of potential metrics is available in the report, Redefining Economic Development Performance Indicators for a Field in Transition, published by the Center for Regional Economic Competitiveness in July 2017. That report provides guidance on themes that data-driven indicators should address, and ways states can implement them effectively. Among the areas that are most relevant for data sharing include connecting third-party validated metrics to expected outcomes, and evaluating alternative data sources for availability and quality.

An important step in this process is to establish an inventory of administrative data (i.e., the data elements and definitions) available across key state agencies. This inventory will help to identify "evaluation-relevant" data elements, meaning that the data element could help answer one or more questions raised by economic development policy analysts and program evaluators, along with gaps in the data. Forming an inter-agency working group to help build this inventory is commonly used approach that could serve an effective strategy for state seeking to build trust and to establish points of contacts across agencies.

12. What elements ought to be included in the agreement?

Following are several key questions that should be clarified in the negotiation between the data holding and data requesting agencies, and these should be incorporated into any data sharing arrangement:

a. Definitions - How is confidential data defined?

   The most sensitive data in a confidential data set are those that are personally identifiable. Thus, defining the specific data elements and how they might be used is vital. Strategies that reduce the risk of privacy breaches, using anonymized (i.e., de-identified) data wherever possible, may help to overcome legal restrictions.

b. Authority - Who is authorized to disclose data?

   Legislation, regulation, and practice all influence the state agency staff who make the deci-

sion and sign off on data sharing arrangements. Those individuals should be incorporated into the negotiation process, especially if no clear policies or practices have been instituted or if the practices are not completely in accordance with federal and state legislative intent.

c. Purposes - For what purposes may data be disclosed?

The rationale for data sharing matters. Federal and state legislation requires that the purpose be relevant to the public interest. Beyond that, the legislative guidance can be either explicit or vague. The natural inclination for data stewards is to abide by explicit directives in legislation, even if the laws are not clear, so linking the purpose clearly to legislative authorization is vital.

d. Parties - To which parties may data be disclosed?

State agencies are often, but not always, allowed to access data. State laws often provide insights about who has the authority to access data. Furthermore, vagaries in state laws can create sometimes unintended barriers for non-traditional organizational arrangements (such as public-private partnerships, non-profit implementing organizations, or academic institutions) in providing access to data, even if for a clearly authorized purpose. Such anomalies may ultimately need to be addressed in legislation or regulation, if not by specific agreement alone.

e. Elements - What specific data elements may be disclosed?

States may find that certain data elements (such as personally identifiable indicators) may be explicitly prohibited from disclosure even though they may be essential for matching administrative records with program data. The strategy that most states take is to limit the data elements shared to those immediately necessary to accomplish the purpose described in the data sharing request. Alternatively, state data holding agencies have created services in which they match the data on behalf of client user agencies and provide the information in a de-identified form that precludes data reidentification.

f. Content Requirement - What types of data are being shared and under what conditions can the results be disclosed?

A key aspect of the agreement is describing the specific data elements that will be shared and under what conditions that can be used. Furthermore, because the data analysis being conducted is for a public purpose, some aspects of the research findings will be disclosed to the public. The agreement should describe the limitations on data disclosure to ensure privacy protections and maintain the confidentiality of the data set.

g. Safeguards - What safeguards are required against potential data disclosure?

The agreement should describe the receiving agency's capabilities and capacity to manage and store the data, including expectations for data security protections that must be in place to protect the data from either potential breaches or unapproved uses.

In addition, many states require that proper safeguards be instituted to ensure data de-identification and to protect data subjects in the case of small sample groups.

h. Payment Provisions - What are the payment provisions for data disclosure?

Data sharing requires resources to manage the data and to manage the process of preparing data for sharing, as well as transactional costs. Some states require these costs to be reimbursed; others do not. The agreement should recognize these costs and assign responsibilities for them to one or more parties in the transaction, whether the data holding or using agency.

i. Penalties - What are the penalties for violating disclosure rules?

Federal and state laws typically define penalties for violating data confidentiality or privacy. The agreement should reflect those requirements as well as any others that state policy may impose.

13. Can a Memorandum of Understanding alone provide for data provision?

A Memorandum of Understanding (MOU) establishes an on-going relationship with a partner agency, and describes the purpose and intention. The MOU identifies the data stewards (or data holders) and the data users and declares the interests of each party in clear terms. The MOU also provides the legal context and authority for the relationship and establishes the basic terms, renewal provisions, and criteria for evaluating the benefits of the relationship for each of the parties.

In other words, an MOU provides the general terms and conditions for data sharing. Depending on the context, an MOU describes an agreement in principle for the relationship and it sets out the framework, but it may not have all the specifics required for an agency to make an actual data transfer. The MOU may be sufficient if a requested data transfer is standardized and never changes. However, this is not always the case, and unique data requests rarely align perfectly with the MOU framework.

If an MOU alone is not sufficient to allow data sharing, an agency may require supplemental agreements that amend the MOU or govern a specific transfer. Some states create recurring data sharing agreements (DSAs), either as addenda to the MOU or as separate agreements. DSAs are often specific to a data set but are more likely to focus on recurring relationships between agencies in which the same data are requested time and again for a standard purpose. DSAs describe the data to be shared and the purpose, authority, and process for implementing data sharing. These data sharing agreements describe the confidentiality requirements and what the data holders and users will do to meet those requirements. The agreement might also include a description of the data transfer process as well as requirements for storage, security, restricted access, and maintenance or destruction of data when completed. The agreement may further include sanctions for violation of confidential requirements, as well as minimum record-keeping requirements associated with disclosures and ensuring compliance. Furthermore, the agreement establishes respective responsibilities of each party, including which bears the cost and liability for the data and at which points.

For data that may be transferred as part of individual transactions (on a "one-off" basis rather than as part of a recurring relationship), states may establish data use license agreements (DULAs). The DULA specifies the specific data elements to be shared and any additional requirements that may be needed above and beyond those described in the MOU. For instance, the DULA may include specific time parameters for data use or provide special provisions for data disclosure or requirements for the data holding agency to review resulting research before its publication. DULAs may be developed in a standardized format (indicating how the request fits into an established set of policies and procedures), but the agreement may also have some unique characteristics for that unique data set.

The MOU reflects standard principles and agreements for sharing; the DSA provides a structured way to make multiple requests for data for the same purpose; and the DULA recognizes that individual requests may require customized terms or conditions unique to that data sharing event. The key difference between a DULA and a data sharing agreement is that the DSA is for recurring-use arrangements, while a DULA is likely to be more limited in scope due to the one-off nature of the data exchange. The DULA would focus more on how the data will be used and protected during use, as well as describing how the costs associated with the data transfer are managed.

14. When is legislation required to authorize the release of data?

Data sharing seems to be easiest to accomplish in states in which the rules are clear. Vague legislation that would otherwise seem to provide flexibility turns out to be most problematic for those seeking to establish data sharing arrangements. While the legislation may not prohibit data sharing, our research finds that this type of "flexibility" is undesirable because data sharing entities are naturally conservative in sharing confidential information with sister agencies. Instead, the agencies seek direct legislative guidance about how and when to share.

States that have executive leaders supportive of data sharing can use executive privileges (such as a Governor's executive order or agency guidance) to embrace data sharing. However, most policymakers and practitioners agree that it helps to institutionalize evidence-based policymaking by embedding data sharing principles in legislation that provides specific guidance on who can access the data, when they can access it, and for what purposes.

Where data sharing is integral to performing a legislative mandate, the explicit legislative language may be needed. For instance, on-going evaluation efforts, such as those advocated by the Pew Charitable Trusts for monitoring incentives or those required by the Federal Workforce Innovation and Opportunities Act, may require on-going access to data that could be facilitated with legislative authority, especially as continuously changing state staff interpret state policies differently. Legislation, while the most significant hurdle to overcome in promoting data sharing, may sometimes be the best option to improve cooperation and collaboration among state agencies with differing missions and limited resources.

More examples of existing state legislation with the most clearly defined data sharing principles are identified at www.statedatasharing.org.

The Center for Regional Economic Competitiveness (CREC) is an independent, 501(c)3 not-for-profit organization founded to provide policy-makers with the information and technical assistance they need to formulate and execute innovative, regional, job-creating economic strategies.

Our primary public service goal is to help regions compete. Through our network of partnerships, we continually work to further regional economic competitiveness. Our work emphasizes the importance of data in informing evidence-based public policy decision making. To this end, CREC conducts research, provides technical assistance, offers expert advice, provides training, and offers leadership to practitioners and policymakers in the economic development, workforce development, and higher education fields. These activities are provided on a fee-for-service basis to an array of federal, state, local, and philanthropic clients. These projects represent the primary source of funding support for the organization, and they rely on our team's technical expertise in the fields of economic and workforce development.

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