



CONTRACTS FOR DATA COLLABORATION

Understanding Public-Private Data Sharing Agreements *Questions to Consider* (Working Draft for Comment and Review)

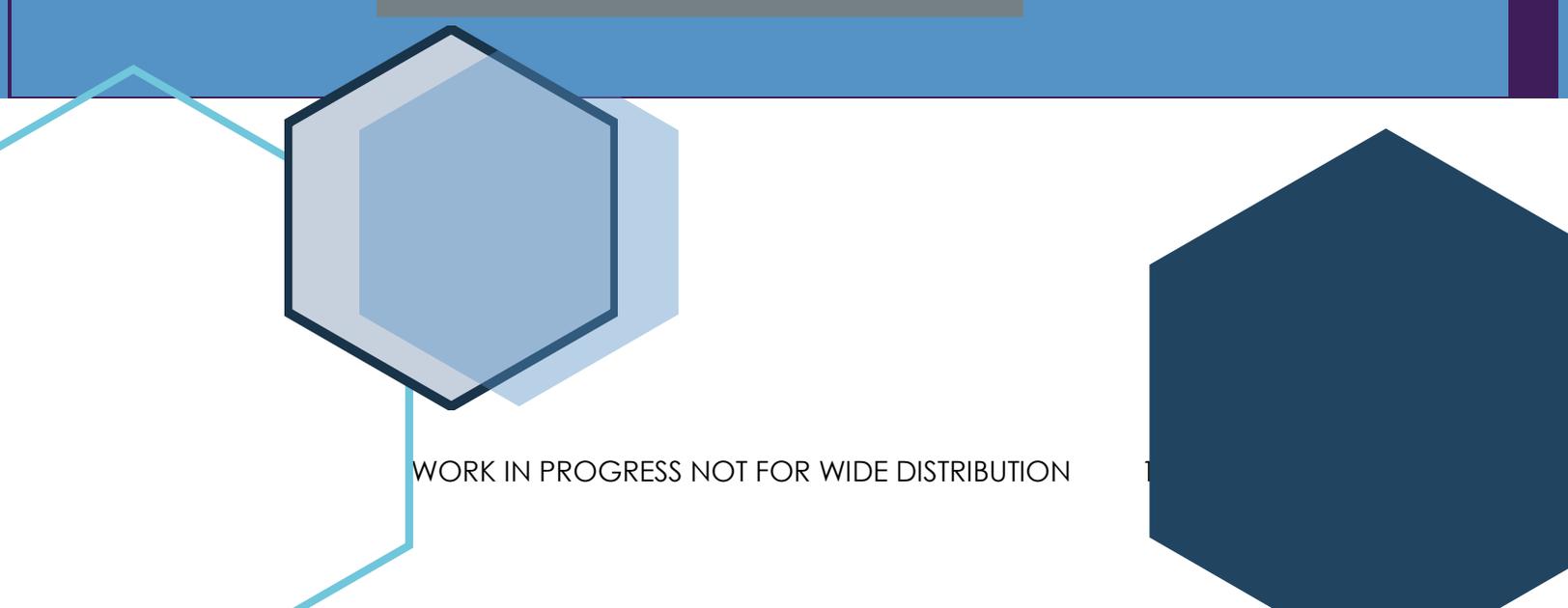


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Contracts for Data Collaboration (C4DC) seeks to strengthen trust, transparency, and accountability of cross-sector data collaboratives. The intent of this initiative is to enable more effective and efficient ways of accessing, sharing and using data for public problem-solving and sustainable development.

Central to C4DC is the objective of demystifying the complexity of data sharing agreements. By providing both an analytical framework and an online library of legal clauses which capture the key elements involved in a data collaboration, the transaction costs and misunderstandings that often occur during the negotiating of a data collaborative can be reduced.

This living document represents only an initial view of the topic and will evolve over time. Readers are actively encouraged to share their feedback (and any additional data sharing agreements) at info@contractsfordatacollaboration.org



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Understanding Public-Private Data Sharing Agreements: Questions to Consider

Titles and Parties

Agreements, contracts, and policies are like short stories - that are told in the formal language of law. The *Title* and *Parties* sections provide a general sense of the kind of story (title) and the characters (“parties” in legal language) involved.

Scope

Contract terms included in the *Scope* category help to convey the context and setting for the agreement.

Governance

Contracts describe the story of the formal “relationship” of the parties. The provisions that provide the processes, procedures and performance expectations for the relationship are included in the *governance* category.

Data

Data comes in many forms and formats and from many different sorts of sources, sensors and platforms. Data provisions of an agreement assure that the parties are in agreement with respect to the characteristics of the data that will be shared or made accessible under the agreement.

How to Use This Tool

The following legal categories were derived from an evidence base of DSA legal agreements and serve as the analytic framework for this document. It is organized around 11 categories of questions and is intended to serve as a guide for non-legal practitioners to gain a better understanding of the key questions to address in order to establish a fair, accountable, transparent and functional data sharing agreement.

Hosting

Sometimes data sharing agreements provide that a party to the agreement or third party will hold the data and make it available for others to use.

Party Duties

The core value of contracts is in setting forth the parties' respective duties and obligations. Enforceable contracts permit parties to rely on the future performance of duties by the other parties to help de-risk and leverage future interactions. All parties to an agreement are well served if the agreement describes their duties with sufficient detail and comprehensiveness that no party is surprised by the way that other parties perform.

Representation and Warranties

Representations are assertions of fact that are made (as of the date the representation is made) by one party to another to induce the other party to enter into the contract.

Warranties are promises to indemnify, (i.e., pay money to make the person "whole"), if one or more such representations/assertions are false, causing harm.

Risk Sharing

Like any relationship, there are many things that can go wrong in a relationship described in a contract, including data sharing contracts. Terms included in the "risk sharing" category offer parties an opportunity to clarify how various sorts of risk will be handled and allocated among the contracting parties.

Timing

Like other stories, contracts have a start, a middle, and an end. There are various provisions of an agreement that affect the timing elements of a relationship. Also, individual duties and performance expectations may be crafted in the agreement to operate during different periods depending on the expectations of the parties.

Governing Law and Disputes

Like other relationships, contract relationships sometimes lead to differences of interpretation that can result in disputes. Contracts frequently provide provisions that indicate the parties' agreement on the processes, applicable law, and other issues relating to how those disputes will be handled by the parties.

Contract question category	Question	Sub-Questions	Explanation
Title & Parties	Who are parties to the agreement?	Who are the signing parties to the agreement?	Provide a list of parties that have signed the agreement, and their role in the performance of the agreement, along with any introductory information about the individual parties.
Title & Parties	Who are the third parties?	If third parties (e.g., users, beneficiaries intermediaries, technical enablers, etc.), are mentioned, does the agreement describe how they will be involved or how their rights will be protected?	<p>Note any third parties that are not signatories but that are recognized in the agreement. The potential list of third parties includes: local communities, researchers, funders, private sector, governments, NGOs, International Organizations, and others.</p> <p>Note that "third party beneficiaries" of the agreement is both an informal consideration about program intention and also a formal legal question. From a legal point of view and at the data "use" perspective, third parties may be (i) simply beneficiaries of the insights and information generated by the data while not having access to the data, such as in the case of the distinction between "background or foreground data, or both, or 9ii) users of the data (either for the recipient's party's purposes or for their own purposes).</p>

Contract question category	Question	Sub-Questions	Explanation
Title & Parties	Who has rights under the agreement?	<p>How will party and non-party interests be protected?</p> <p>Who is the “data controller” or “data owner” where such terms are used under applicable law?</p>	<p>Contracts establish rights and duties of the parties. They can also affect the interests of non-parties.</p> <p>The parties should be clear about who is burdened and benefitted by the terms of the agreement, and whether or not they have specific enforceable rights under the agreement.</p> <p>For example, if data is being shared to benefit a particular population of disaster victims, but those victims are not formal 'parties' to the agreement, the victims may not have rights under the agreement, but the parties may want to protect the victims' rights through another mechanism.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Title & Parties</p>	<p>Who has what duties under the agreement?</p>	<p>What duties are placed on one or more of the parties to support achievement of this data sharing program's goals?</p> <p>Who is responsible and what are duties relating to data submissions, data accuracy, third party consents to transfer of data?</p> <p>If there are multiple recipient parties involved, how are any differences in roles or responsibilities documented? How will the duties and responsibilities of the parties be secured?</p> <p>How will the duties and responsibilities of the parties be secured?</p> <p>Are there obligations related to use of the "foreground data" (e.g., when obligation to cross-license data, obligation to make available the foreground data in the same terms as obtained - similar to copyleft licenses in copyright)?</p> <p>What are the potential liabilities of parties with duties with respect to the data, its use by the recipient party, and its use by third parties?</p>	<p>Contracts establish rights and duties of the parties. They can also affect the interests of non-parties.</p> <p>The parties should be clear about who is burdened and benefitted by the terms of the agreement, and whether or not they have specific enforceable duties under the agreement.</p> <p>For example, if a school enters an agreement to share student data for government poverty-relief efforts, are the students or teachers under a duty to help fulfill those duties, even if they are not direct contracting parties?</p> <p>The contract should also be clear about the obligations placed upon the recipient party with relation to the use of the background data and also of foreground data.</p> <p>Responsibilities and potential liabilities need to be defined both:</p> <p>(i) For the data supplied (i.e. background data). This involves issues such as: quality, accuracy, lawfulness, completeness, reliability, the impact of incorrect data on decisions, issue of data veracity from sources not party to the contract),</p> <p>(ii) For the reasonably anticipated use of such data by the recipient. This involves, for instance, issues of destruction/loss or alteration of data, issues of use of data processing resorting to AI and (iii) For third parties.</p>

			<p>With relation to third parties, because they are not part of the contract, when third parties use the data, liability for use in violation of the contract terms needs to be clarified. Usually, chains of responsibility and liability throughout the data value chain described in the agreement are documented in the agreement.</p> <p>Alternatively, for certain data, cross-waivers of liability may be applied if allowed under applicable mandatory laws.</p> <p>Liability should also be specified for foreground data (usually connected with whom develops and uses them).</p>
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Contract question category	Question	Sub-Questions	Explanation
Title & Parties	Who else can access the data?	<p>What is mechanism for data to be made available to stakeholders that are <i>not</i> parties to the agreement?</p> <p>What is the procedure for authorizing data access?</p> <p>Which parties are permitted to access and/or manipulate data assets shared through the agreement, and for what purpose? Are there requirements (legal/regulatory) in connection with the use of data by third parties?</p> <p>How will access controls be established within institutions, particularly for recipient or intermediary organizations?</p> <p>Under what circumstances will data and/or insights be made available to parties such as expanded stakeholder community, scientific community, research partners, secondary research/users, students/student workers, policy drafters, government representatives, commercial parties?</p>	<p>Explain how access controls and procedures will be established within institutions that are parties to the agreement and by third parties.</p> <p>Access controls should be described in relation to the recipient party to the contract and in relation to third parties' accessing the data - but not party to the contract). Indicate if there are "purpose limitations" imposed on access based on the type of third party involved that accesses the data and the scope of their activity (e.g., R&D institution - purpose: research and publication; public agency - purpose: designing and executing public policies)</p>

Contract question category	Question	Sub-Questions	Explanation
Title & Parties	<p>How do parties communicate?</p>	<p>How do contracting parties communicate among themselves and with others about the program that is documented in their contract?</p> <p>Are there defined terms agreed to by the parties in the agreement to avoid misunderstandings?</p> <p>Who has authority to receive notice for each party?</p> <p>What are reporting requirements between and among the parties?</p> <p>How are third party contacts and inquiries handled?</p>	<p>Internal and outside communications both play a role in supporting the program of which the data sharing component is a part.</p> <p>The contract should describe the parties' expectations regarding communication and information flows under the program.</p>

Contract question category	Question	Sub-Questions	Explanation
Scope	Why has this agreement been formed?	<p>What is the "need" that the data activities covered by the agreement will address?</p> <p>What are the activities and purposes to which the data will be applied?</p> <p>How does the data and the various anticipated "data actions" serve the intended purposes of the program?</p> <p>Can the data be used for subsequent related purposes and how? If yes, are those purposes compatible with the initial ones?</p>	<p>Explain the problem area that the data sharing collaborative is addressing, the stated purpose of forming this agreement, along with shared motivations and understandings that are given.</p> <p>This question considers the context and purpose of the data collaboration in general and this agreement.</p>
Scope	Who will receive the data?	<p>Which party or parties will receive the data and/or data rights provided through the agreement?</p> <p>Who, within the recipient party, is authorized to access and use the data?</p>	<p>Indicate which party (or parties) will receive particular data sets, streams or data rights.</p> <p>Indicate who, within the recipient, is authorized to use the data (e.g., employees, service providers, others) and the duties and requirements to which they are subject (e.g., in terms of capacity, confidentiality, etc.). E.g., if the recipient is a State, consider which ministries, agencies or others may use the data.</p>

Contract question category	Question	Sub-Questions	Explanation
Scope	Why is it believed that data actions under the contract will help address the purpose of the agreement?	How does the use of the data fulfill the purpose given above?	Explain how the partners ultimately plan to use the data.
Scope	How is data use limited?	What specific limitations are being placed on the use of share data assets or streams?	Sometimes parties providing or sharing data want to limit its use in time, territory, authorized users, or in scope to prevent the data use from being contrary to its other interests. Those "other interests" may be proprietary, competitive, contractual, etc. Any such limitations should be specified in the agreement, where they can be made binding on the recipient party.

Contract question category	Question	Sub-Questions	Explanation
Governance	How is the program managed?	<p>How is the data sharing relationship managed?</p> <p>How is program administered?</p> <p>How will data [actions][manipulation] be managed over the lifespan of the project – including as it relates to version control, format changes, additional datasets brought into the analysis, etc.?</p>	<p>The data sharing agreement provides an opportunity for the parties to review and describe their operations and administration as they relate to data and data sharing.</p> <p>Each relevant data action (such as collection, holding/hosting, processing, transfer, etc.) should be described in sufficient detail to enable the operation and administration of the program in accordance with the expectations of the parties.</p>
Governance	How are access permissions handled?	<p>Are there different levels of access and permission structures for different stakeholders and/or roles, etc.?</p> <p>Are there specific requirements for access (e.g., mode of access, frequency of access, service levels)?</p> <p>How are new participants admitted (esp. if multilateral agreement)?</p> <p>What is the process for the admission of new participants and the granting of access to new stakeholders? Is there a committee (formed from among stakeholder representatives) that makes those determinations?</p>	<p>In data sharing settings, the data may be stored by one of the parties to the agreement or a third party.</p> <p>Regardless of who is in possession of the data, procedures for accessing the data must be put in place to prevent unauthorized access, and to prevent parties with authorized access from exceeding the scope of their authorization.</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	How is the agreement formed?	<p>Explain the form of this agreement.</p> <p>Is it a legal contract, an MOU, an agreement in principle, etc.?</p> <p>Is it a bilateral or multilateral agreement?</p> <p>Is it binding or non-binding agreement?</p> <p>Are there related agreements (such as data hosting) to integrate or to cross reference?</p> <p>Are there "attachments" or "exhibits" that are part of the agreement?</p> <p>What will be the "master copy" of the agreement?</p> <p>Where will the authoritative data sharing agreement terms be maintained?</p>	<p>Human and institutional "agreements" can take many forms and be documented in various ways. Each has different advantages and disadvantages for the parties.</p> <p>Many parties have existing relationships (such as commercial relationships or statutory relationships of government entities, etc.) that can influence the form that a data sharing arrangement can take.</p> <p>The parties should consider the level of formality and enforceability that they desire in the agreement in relation to their other pre-existing ties to one another.</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	How is the program resourced?	<p>What are the Funding and Resource Requirements for the Project?</p> <p>What are other resource sharing and allocation understandings - samples, infrastructure, money, cross use of data, etc.?</p> <p>Who pays what costs and provides which resources?</p> <p>How will unanticipated costs be avoided and handled?</p> <p>What is expected compensation for data management personnel?</p>	<p>All data sharing arrangements rely upon some level of commitment by the parties, sometimes including the commitment to provide money, resources and personnel support needed to make the program a success.</p> <p>These program resource requirements should be detailed in the agreement. Parties frequently also include a provision that a party is not permitted to incur costs on behalf of another party without their permission - the parties are not agents for one another.</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	How are parties held to account?	<p>If the data is being used in ways outside of the data controller's legitimate interests are there: impact balancing assessments, independent supervision/governance bodies, processes for engaging with the data subject to inform them of their rights, duties and remedies?</p> <p>How will data use and access be tracked?</p> <p>What are accountability mechanisms for party performance under the agreement?</p> <p>How is compliance with agreement terms measured?</p> <p>Will data use and access be auditable and by what mechanisms?</p> <p>Are there supervision /audit rights and obligations? Who can supervise/audit (e.g., supplier, third independent party)?</p> <p>What can be subject to supervision/audit (the data being supplied, the use of data)?</p>	<p>What are the mechanisms through which a party's performance is tested under the agreement?</p> <p>What are the remedies for parties in situations where other parties fail to perform under the agreement?</p> <p>Consider escalation processes to scale the remedies to the severity of the party failure.</p> <p>Supervision and /or audit rights may be important for both the supplier (to control the use being made of the data) and for the recipient (to ensure the quality of the data, especially in data streams).</p> <p>The scope of the supervision / audit shall also be assessed (e.g., what data, where supervision can take place, when, by whom, to whom - especially relevant if supervision/audit can be made of third parties benefiting or using the data).</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	Who among the parties is affected by rules from outside the agreement that affects their performance of data actions?	Are there rules outside of the agreement that affect its operation?	<p>Various statutory and regulatory rules, as well as normative and other policy and economic variables affect the performance of various parties whether or not the contract is in place.</p> <p>For example, US banks are subject to bank regulation "outside" the contract, so the performance of banks under data sharing agreements will be affected by this outside law. Contracts often include a clause that the contract will be deemed modified to the extent necessary to conform to applicable law.</p> <p>Ask whether such modification would undermine the parties' expectations for performance under the contract.</p> <p>Contracts also usually contain warranties by the parties declaring that they comply with applicable mandatory law. It is important to determine, on a case-by-case basis, who has to comply with what and how it may affect the purposes of the contract.</p> <p>Data sharing agreements should also be analyzed under applicable competition law and public procurement law. With relation to competition law in certain jurisdictions, in the case of B2G data sharing, data collaboration could be considered unfair to competitors if, for instance, it creates a privileged relationship enabling a business to</p>

			<p>access confidential information regarding the public body that they would not otherwise have.</p> <p>Separately, countries usually have public procurement laws that create requirements with relation to how suppliers can be contracted (e.g., launching public tenders, certain requirements and clauses that the contract needs to have).</p>
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Contract question category	Question	Sub-Questions	Explanation
Governance	How are terms defined?	What definitions are given? What are the rules for interpretation of the agreement?	<p>One of the helpful features of contracts is their use of defined terms. Defined terms in an agreement help to limit ambiguities that may be present in common usage of a term, and thereby reduce risk to the parties associated with that ambiguity.</p> <p>Are there defined terms that the parties will use in the agreement? These should be defined in the agreement or by reference to a stable set of definitions provided elsewhere.</p> <p>Note that local law may establish and apply certain definitions that should be taken into account in drafting agreements the interpretation of which may be subject to that law.</p> <p>For example, some jurisdictions may establish requirements applicable to the definition of "data ownership", while others may not apply that phrase.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Governance</p>	<p>When can the agreement be modified?</p>	<p>What are the procedures for modifying the contract?</p>	<p>Parties may find that their situations change or that their real-world operating context is different than that imagined at the time of contract preparation.</p> <p>In those and similar circumstances, the parties may desire to modify the agreement to better align it with reality.</p> <p>Parties should consider the likely frequency of such modifications (particularly for long term agreements), and how they will be effected, and how the modification can affect party actions started prior to modification.</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	How will the program be publicized?	<p>How are program activities publicized?</p> <p>Is there a plan for publicizing results broadly for maximum impact from program output?</p> <p>Who will act as a spokesperson for the program?</p> <p>What is approval process for different types of communication?</p> <p>What are protections of confidentiality of data in context of publicity?</p> <p>What are the requirements for acknowledgements of contributions to the program in any public statements?</p> <p>Are there mechanisms to assure that data dissemination and communication are "appropriate" from various non-legal, cultural perspectives?</p>	<p>Successful data sharing and data collaboration relationships depend on communication.</p> <p>Internal communications among the contracting parties are dealt with elsewhere in this tool.</p> <p>The parties should also consider the communications of the parties relating to the program also to OUTSIDE parties.</p> <p>How are written and spoken communications of the program organized to assure consistency and impact of the program?</p> <p>What are the processes and procedures that can help assure that there is appropriate consensus about the communications?</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	To whom can duties under the agreement be delegated or rights be assigned?	If a party to the agreement can delegate its duties or assign its rights under the agreement, how is the third-party service provider's performance managed and how are responsibilities and liabilities assessed?	<p>Parties to an agreement occasionally need to assign some or all of their rights, or delegate some or all of their duties under a contract to another party.</p> <p>Assignments of rights are often less constrained than delegation of duties, since the performance of the duties is critical to parties realizing their expectations under the agreement.</p> <p>In any event, the parties should be clear about whether any rights may be assigned or any duties under the contract might be delegated and/or subcontracted to another party.</p> <p>In the latter (delegation of duties) case, in the absence of a release, typically the delegator will still be held responsible for the subcontractor's actions if there is a performance failure.</p>

Contract question category	Question	Sub-Questions	Explanation
Governance	Who needs to receive training?	<p>Are there requirements for training or certification of any parties or stakeholders relating to: confidentiality, security (at appropriate system levels), business intelligence techniques and analytics, capacity/capability/professional requirements, human rights, cultural adaptation, data de-identification, data breach responses, other relevant statutory requirements, data administrators and technical specialists?</p> <p>Does that training cover all stakeholder needs?</p> <p>Is training available from start to finish of the program?</p> <p>Is the training easily accessible?</p>	Topics for training might include: confidentiality, security (at appropriate system levels), business intelligence techniques and analytics, human rights, cultural adaptation, data de-identification, data breach responses, other relevant statutory requirements, data administrators and technical specialists

Contract question category	Question	Sub-Questions	Explanation
Data	<p>What data assets or data streams are covered by the agreement?</p>	<p>What are the data assets or data streams that are the subject of the agreement?</p> <p>What type of data is it (e.g., personal vs. non-personal, raw vs. processed)?</p> <p>What are the quality levels of the data (also over time) and granularity?</p> <p>Are there requirements for certain characteristics (accuracy, completeness, reliability, lawfulness, updated)?</p> <p>Are all data sources party to the agreement?</p> <p>Was data collected directly from data subjects or produced by other means?</p> <p>Are additional data assets or streams likely to be introduced to the program over the course of the project?</p> <p>Is the data sharing initiative under consideration duplicative with existing datasets?</p>	<p>Describe the technical specifications of the data that are covered in this agreement.</p> <p>This can include explanations of the phenomena under consideration, the measurement process, the data specifications, and more.</p>

Contract question category	Question	Sub-Questions	Explanation
Data	What will be the Format of the data?	<p>What data formats, standards, and conventions will be applied to the data assets?</p> <p>Can the data be ported to another system?</p>	<p>Data can be collected and held in multiple formats. The use of inconsistent formats can hinder the use of data by other parties.</p> <p>The parties should discuss the format in which the data is held and whether any conversions or conforming changes to format are needed to support the data actions anticipated under the agreement.</p> <p>Data portability can also be considered, in order to avoid data lock-in, at least for foreground data integrating background data.</p>
Data	What are the requirements for metadata?	<p>How and according to which standards will metadata be generated?</p> <p>How will any program metadata be shared between parties (if at all)?</p>	<p>The term "metadata" refers to data generated through processes that use other data.</p> <p>"Meta-data" is just another type of data, but the term is used to distinguish it from the original data that is the subject of a particular program.</p> <p>Thus, for example, a data sharing agreement may generate "meta-data" about who used the shared data, what dates it was used, etc.</p> <p>If the program will generate such "meta-data" how will the metadata be handled? Will the metadata be subject to the same terms as the original data, or will other terms apply?</p>

Contract question category	Question	Sub-Questions	Explanation
Data	What forms of permissions and consent are needed to access and use data about people?	<p>Who is responsible for assuring the necessary permissions and consents have been secured for the various data actions (such as collection, storage, hosting, analysis, etc.) relating to data about people that are anticipated under the agreement?</p> <p>Who is responsible for engagement with data subjects?</p>	<p>This question relates to the subset of data that is about individual humans.</p> <p>There are a host of specific laws and policies that affect data actions taken with respect to such data.</p> <p>The parties should discuss which of such specific rules apply (if any) and who will be responsible for compliance with these rules.</p> <p>The parties should also assess models for anonymization and aggregation to mitigate impact of personal data rules.</p>
Data	Who will provide the data?	Who will provide the data?	<p>Indicate which party (or parties) have committed to providing particular data sets, streams or data rights to enable the data activities.</p> <p>Also note any data providers that might not be party to the agreement. If this is the case, the original source of the data may have to be cleared. This may prove difficult as data sets may include data from multiple sources which have been combined.</p>

Contract question category	Question	Sub-Questions	Explanation
Data	What is the source of the data?	<p>Were data collected from individual data subjects?</p> <p>Were the data collected from a publicly accessible database, API, internal administrative data sources, etc.?</p>	<p>Related to the data description, explain the actual source of the data, such as from the following contract-performance-relevant points of view: personal (with all upstream stakeholders' in the value chain), material (what the data relate to, sector (telecoms, health, finance, energy, etc.) and territorial (where does it come from?).</p>
Data	How are the rules for various data actions under the agreement organized and operated to achieve program goals?	<p>What are rules for collection, generation, use, transfer of data?</p> <p>What is timing of data access/data transfer in the agreement?</p>	<p>Data sharing agreements can help to make the actions of parties taken with respect to data more reliable and predictable.</p> <p>The parties should consider all of the actions that each will be expected to take with respect to data and assure that the agreement terms are consistent with those expectations.</p> <p>It is also helpful to get the operational and administrative personnel involved early in the contract discussions to assure that the contract promises are achievable from an operational perspective.</p> <p>The anticipated usage of the data should be considered and documented. Different types of data actions might include, collection, access, reproduction, hosting, distribution, transfer, development/modification/creation of derivative data (foreground data), combination with third party data, testing, etc. The scope of use should also be addressed (e.g., commercial / non-commercial)</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Data</p>	<p>How does the agreement promote reliability/predictability/trust among parties?</p> <p>Are there mechanisms to help assure data quality and relevance?</p>	<p>How does the agreement make the parties' data actions more reliable and predictable?</p> <p>Does the agreement include or cross reference any technical specifications regarding the data infrastructure?</p> <p>How is data made available from a technical point of view?</p> <p>What are the applicable "service level agreements?"</p> <p>Are there value-added services under the contract (e.g., capacity-building, analytics services)?</p> <p>Are there error reporting mechanisms for incorrect data?</p> <p>Are there support and maintenance models for technical infrastructure and for assessing the quality of the data, e.g., to avoid bias (including service levels for the services)?</p>	<p>An agreement can help to build trust among parties without other relationships. The parties should consider the ways in which a lack of trust hampers interaction between the parties and seek to use the data sharing agreement to help establish and build trust in those areas.</p> <p>Trust can be built from objectively measurable performance when available. Data systems rely on technical and policy components, and the technical aspects may be amenable to measurement. Describe the technical specifications of the technical infrastructure that makes the data available and that enables access to the data.</p> <p>Describe the specific characteristics of streaming data (e.g., download of data, remote access, data as a service). Public actors may lack the knowledge and tools to effectively use the data.</p> <p>incorrect data may jeopardize public interest purposes. To address potential limitations and potential bias, support by the supplier to assess the quality of the data (including through audits) can be addressed in the contract. This does not mean that the supplier is required to improve the quality of the data it supplies.</p>

Contract question category	Question	Sub-Questions	Explanation
Data	How will the scale and type of data actions affect party performance ?	How does the nature, scope and scale of the data that will be generated or collected affect party's data duties?	Consider whether additional duties and resources are needed to scale the system or to incorporate different sorts of data.
Data	How will data be managed in the long-term?	<p>Is there a plan for archiving data and/or long-term storage?</p> <p>In the alternative, is there a requirement that data (and/or derived data) be deleted at a certain time?</p>	<p>Establish and document any requirements for either archiving data or deleting data at a certain time.</p> <p>The parties should consider how long the data will be needed and how it will be managed and accounted for during the term of the contract (and even after contract termination where the parties agree).</p> <p>Assess the application of these requirements to "background" and "foreground" data.</p>

Contract question category	Question	Sub-Questions	Explanation
Hosting	Who is the data host?	<p>Who will be hosting the data, and is this entity a party to the agreement?</p> <p>What duties are placed on the data host?</p> <p>If the host is not one of the parties, then to whom does the host owe primary loyalty?</p> <p>Is the host an "agent" or representative of a party to the agreement?</p> <p>Is there a "Data Steward / Fiduciary" role envisioned for the host?</p>	<p>The purpose of the contract is to document the parties' expectations regarding various data actions that will be taken with respect to the subject data.</p> <p>Data Hosting is a term that encompasses multiple potential data actions, such as storage, processing, transfer, etc.</p> <p>The status of the data host as a party, as a fiduciary, etc. should be discussed by the parties, and described in the agreement to help set party expectations regarding those actions.</p>

Contract question category	Question	Sub-Questions	Explanation
Hosting	How is data hosted?	<p>What are the requirements for data hosting?</p> <p>Are there technical and/or policy specifications relating to the system where it is hosted or accessed by stakeholders?</p> <p>How are requirements associated with data hosting and access established or changed?</p> <p>Where is the data housed and mirrored?</p> <p>Are there any special requirements associated with hosting data about individuals or confidential or proprietary data?</p> <p>What specific limitations are being placed on the use of shared data assets or streams?</p>	<p>The hosting or holding of data is an important data action.</p> <p>Data must be held so that it is sufficiently secure, accessible and useable to fulfill the parties' needs under the relevant program.</p> <p>When data is being shared, the party providing the data will want to be satisfied that the data hosting and other actions will have sufficient integrity so that the value of the data is not compromised for use in their other operations.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Security & Privacy</p>	<p>How will security and confidentiality be protected?</p>	<p>Are there provisions in the agreement that establish performance criteria for technical systems, people or institutions (both for data storage and data sharing transactions) to further security and privacy (system integrity) goals?</p> <p>Are there specific requirements to keep the data, the relationship, or other aspects of the program secret, secure or confidential?</p> <p>Do one or more of the parties have expectations that data and/or the program will be considered secret and kept confidential beyond the requirements of relevant security and privacy laws?</p> <p>Are there potential harms to person or property that might occur if identity, and data are not kept secure?</p> <p>If data or program information is expected to remain confidential, is the recipient of such data capable of maintaining such confidentiality consistent with other program goals?</p>	<p>Consider both intentional and accidental breaches of security and confidentiality in setting expectations for data system integrity, security and privacy.</p> <p>Consider issues of protecting data at rest and in transit.</p> <p>In establishing performance criteria, consider the data supplier interests, (e.g., trade secrets).</p> <p>Also, consider obligations under applicable law to report security and data breaches and to whom such report shall be made. NOTE that “applicable law” for purposes of determining the duty to provide notice of data breach can include (under certain laws) the law of the residence of the data subjects (or the law where the data subjects are) in the case of various types of personal information.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Party Duties</p>	<p>Who will analyze the data?</p>	<p>If one party will perform data analysis on behalf of others, is that process described in the agreement?</p>	<p>The analysis of data involves the application of one or more analytical frameworks.</p> <p>These frameworks may be formal (like institutional checklists) or informal (like biases, etc.).</p> <p>In either event, the "analysis" of data signals the conversion of inert data to valuable insight and information. When that value creation exercise is engaged in by one party on behalf of another it is important that the agreement document the manner in which that value will be accounted for (in terms of sharing value and in terms of documentation) among the parties.</p>

Contract question category	Question	Sub-Questions	Explanation
Party Duties	How are proprietary issues handled?	<p>Are there elements of the planned collaboration, e.g., intellectual property, that necessitate additional licenses, certifications, or other legal instruments?</p> <p>Are there IP (copyright, patent, trademark, trade secret) issues to address (e.g., technical infrastructure/software, databases)?</p> <p>Are there other proprietary interests of parties to address (including, for instance, with relation to "foreground data" in jurisdictions in which that term is applied)?</p>	<p>"Proprietary" interests include such things as the commercial, competitive, property ownership (including intellectual property), reputation and other similar interests of a party.</p> <p>Parties entering into data sharing interests will frequently make such proprietary interests explicit in the agreement, so that the parties are clear on what is and is not being made available to the other party.</p>
Representation & Warranties	How are representations and warranties handled?	<p>Are there representations and warranties relating to authority to enter into the agreement, compliance with law, ownership of "foreground" and "background" data (where applicable), quality of data and/or underlying technical infrastructure, authority to share data, third party consents?</p> <p>Are there express exclusions of warranties (e.g., provision of data "as is")?</p>	<p>Representations are assertions of fact and warranties are promises to indemnify if the fact is untrue and such breach of warranty results in damage (breach of warranty may also result in termination of the agreement), that are required to induce agreement of the parties.</p>

Contract question category	Question	Sub-Questions	Explanation
Risk Sharing	How are issues of risk handled?	<p>What are the parties' expectations regarding various risks of the relationship, including threats and vulnerabilities from intentional and accidental causes?</p> <p>How is risk sharing enforced? How will the parties structure terms be relating to indemnification, disclaimers, limitations on liability, and insurance requirements in support of their respective and collective goals under the agreement?</p>	<p>Parties can be affected by various threats to and vulnerabilities of themselves and other parties (including non-parties to the agreement) that can undermine their achievement of goals under a data collaboration.</p> <p>How are various risks associated with intentional attacks, unintentional accidents, acts of nature and acts of AI/autonomous systems accounted for by the parties in the agreement?</p> <p>Do any of the parties seek to limit their liability for any such risks?</p>

Contract question category	Question	Sub-Questions	Explanation
Risk Sharing	How are data breaches handled?	How are the statutory and operational requirements of data breaches handled?	<p>Data breach laws have been passed in various jurisdictions in the last several years.</p> <p>Most such laws require notice to data subjects when data about them has been compromised, and many create other duties as well.</p> <p>"Data Breaches" are variously defined in different jurisdictions, but all involve some degree of unauthorized access to data (frequently "personal data" relating to individuals).</p> <p>Another important issue relates to security breaches: many countries laws require notification of security breaches similar to the laws on personal data breach notifications, and there may be sector-specific laws addressing the same matters. These would still apply when the data being handled is not personal data.</p> <p>Data sharing agreements and data collaborations should be crafted with these "background law" requirements in mind to assure consistency with relevant jurisdictions.</p>

Contract question category	Question	Sub-Questions	Explanation
Risk Sharing	How are extreme events that impact the contract handled?	<p>Are there extreme circumstances that could interfere with the parties' performance under the agreement?</p> <p>Are there circumstances in which the parties would be relieved of their duties under the agreement?</p> <p>What part of parties' duties is relieved in the event of a supervening "act of nature?"</p> <p>What part of parties' duties is relieved in the event of a supervening "act of AI?"</p> <p>Who is deemed responsible for harms caused unintended consequences of AI, machine learning, and algorithmic decision making in the program?</p> <p>What are the allocations of responsibility for AI, algorithmic and other analysis and decision making undertaken by system components that are neither human or institutional, and hence are not subject to being sued in their own names?</p>	<p>In contract law, "force majeure" provisions relieve parties of certain duties in certain extreme circumstances (such as floods, storms, general strikes, wars, etc.).</p> <p>The parties should consider the types of events that are outside of any of the parties' control, but which could affect their performance under the agreement.</p> <p>Many countries are also starting to address potential contract performance issues when AI is used (including liability issues).</p> <p>Data sharing agreements and data collaborations should be crafted with these "background law" requirements in mind to assure consistency with relevant jurisdictions.</p>

Contract question category	Question	Sub-Questions	Explanation
Timing Issues	When is the agreement in effect?	What is the initial term of the agreement and how do renewals work?	Data agreements are typically not perpetual. What is the agreement term and how does it match the party's data needs?
Timing Issues	When will data actions take place?	<p>Give any time specific data actions from the agreement. When will data actions under the agreement begin and end?</p> <p>What is the timing of data access/data transfer?</p> <p>How regularly will data be updated?</p>	<p>The timing of the performance of duties is typically important to one or more parties to an agreement.</p> <p>Important dates should be specified in the agreement.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Timing Issues</p>	<p>When can the agreement be terminated?</p>	<p>Is termination possible both with or without cause?</p> <p>What notice is to be given to terminate the contract?</p> <p>Can certain participants be suspended without terminating the entire agreement?</p>	<p>Agreements can expire at their end date, or can be terminated early.</p> <p>Pathways and settings in which termination before expiration is permitted are often set forth in agreements to help manage the relationship during what may be a less amiable period.</p>

Contract question category	Question	Sub-Questions	Explanation
Timing Issues	Do any contract duties survive when the agreement is terminated?	<p>Are there duties from the agreement that continue beyond termination?</p> <p>What are the effects of termination?</p>	<p>Certain duties might appropriately extend beyond the termination of the agreement.</p> <p>Such duties might include data security measures to protect confidentiality and privacy.</p> <p>Other duties may arise from termination, such as payment of agreed value, return of payments made.</p>
Timing Issues	Do data need to be deleted when the agreement is terminated?	<p>Is there an obligation to dispose/destroy data upon termination?</p> <p>Is there an obligation to certify such destruction?</p> <p>Is there a right to audit such destruction?</p> <p>How can such an obligation be operated for foreground data that integrates the background data?</p>	<p>Data is intangible which means that it can be physically copied with ease.</p> <p>As a result, it is difficult for a data provider to assure that data recipients don't continue to enjoy the value of data after contract termination.</p> <p>They cannot rely on the "return" of the property as they can with leased physical equipment, etc.</p> <p>Parties should consider what actions are appropriate regarding data upon termination.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Governing Law and Disputes</p>	<p>Do the locations where the program actions take place create connections that lead to certain legal requirements ?</p>	<p>Consider the place in which each action covered by the agreement will occur. This includes the various data actions such as data collection, copying, holding, transfer, processing, using, etc. From where can the data be accessed or used, or benefitted from?</p> <p>What is the applicable law for the contract and does it require the localization of data in a specific geography?</p> <p>What national/regional regulatory regimes apply?</p> <p>Does the law/regulation of the place where each action will occur establish certain duties (such as privacy or security duties) that can affect the expected "duty of care" of a party under the agreement?</p> <p>Are there other aspects of the agreement that create "nexus" such as residence of the data subjects, locations of services, etc.</p> <p>Are there administrative or judicial standards in which the activities take place (or where the data subjects reside</p>	<p>Consider the place in which each action covered by the agreement will occur.</p> <p>This includes the "place" of various data actions such as data collection, copying, holding, transfer, processing, using, etc.</p> <p>Under the law of all jurisdictions, various actions are deemed to create a legal "presence" (called nexus) which empowers that jurisdiction to apply its laws to the parties taking such actions.</p> <p>For example, owning property in a jurisdiction, "doing business" in a jurisdiction and other actions typically convey "jurisdiction" on a location.</p> <p>Data systems (cloud, networks, etc.) are new, and are treated incompletely and inconsistently under various laws. This is a messy area, particular in the context of cross border data sharing and collaboration.</p> <p>Consider that certain privacy laws require compliance with the laws of the residence of the data subject - which is not necessarily the same as the location of the data or data actions.</p> <p>Also, the GDPR (but not US state law) applies to individuals in the EU, even if not resident there (among other criteria).</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Governing Law and Disputes</p>	<p>Does the transfer across borders create additional requirements ?</p>	<p>Will the data (or information gleaned from the data) be transferred across borders?</p> <p>Are there other jurisdictions that might be involved?</p> <p>What are the legal mechanisms in place regarding the transfer of data?</p>	<p>The presence of a national (or subnational) border over which data is shared or accessed can raise particular issues of legal jurisdiction and sometimes conflicting authority.</p>

Contract question category	Question	Sub-Questions	Explanation
<p>Governing Law and Disputes</p>	<p>How will any non-legal behavior standards affect the parties' performance ?</p>	<p>What, if any, norms, standards, principals, or other considerations might oblige certain actions by parties? Are there non-legal sources of performance measurement that the parties should reference in the agreement?</p> <p>Are there non-legal (e.g., normative, ethical, principal-based, trade practices, industry standards) that establish rights or duties of care?</p> <p>Are there other non-legal or informal codes of conduct that are expected to guide the behavior of one or more of the parties?</p> <p>Are there any university research teams that might have requirements for data operations and/or publication that apply to the data covered by the agreement?</p> <p>Are there any trade associations International Associations or commercial collaborations that have normative rules for data sharing?</p> <p>If the data is being used for scientific enquiry is there an Institutional Review Board (IRB) or equivalent?</p>	<p>Parties behaviors and actions are influenced by both legal requirements (established in laws, regulations and contracts) and non-legal expectations (such as norms, principles, ethical codes, etc.).</p> <p>Large scale data networks are relatively new, and don't benefit from extensive legal precedent for their organization and operation. That vacuum is sometimes filled by principles (such as "Fair Information Practice Principles" and other non-binding behavioral and performance standards.</p> <p>Even where such non-legal authorities are unenforceable, they may be stable enough to be cross-referenced in the agreement, providing additional guidance to participants.</p> <p>The agreement may also establish that such guidelines are binding, and thus their compliance will become a contractual obligation, the breach of which may lead to contract-based remedies including indemnifications and termination of contract.</p>

Contract question category	Question	Sub-Questions	Explanation
Governing Law and Disputes	Are there procedures in place for when conflict arises between parties?	<p>What are the procedures in the agreement for resolving conflicts between parties?</p> <p>For example, is there an escalation process to resolve disputes internally?</p> <p>Does the agreement call for alternative dispute resolution (arbitration or mediation)?</p>	Even good relationships can give rise to misunderstandings and disputes. To the extent that such events are anticipated by the parties, efficiency can be gained by including dispute resolution and escalation provisions in the agreement.