MHS' Test Disclosure Policy
Adopted by leading Canadian test publishers and the Canadian Psychological Association ("CPA")

Client Access to Test Results in Canada

The position of Multi-Health Systems Inc. ("MHS") and Harcourt Assessment on the issue of test disclosure and the release of test results takes into consideration access rights to test information and results under the Canadian *Personal Information Protection and Electronic Documents Act* ("PIPEDA") and the United States' *Health Insurance Portability and Accountability Act* ("HIPAA"). For over 20 years, we have consistently applied and continue to maintain our non-disclosure policies regarding test items, response/answer sheets (which include test items), test manuals, user guides, wall charts, scoring templates, scoring keys, scoring programs and other test protocols ("Test Materials"), which is consistent with new privacy legislation in both Canada and the United States.

CPA, leading test developers, and the release of test results under PIPEDA and provincial privacy legislation

The Canadian Psychological Association ("CPA") (www.cpa.ca), MHS, and Harcourt Assessment maintain a policy of non-disclosure of Test Materials to clients who request such material under PIPEDA and provincial legislation. Psychologists and other qualified test purchasers are encouraged to follow this policy in order to protect the integrity/validity of the assessment, protect the public, and the publisher's intellectual property rights.

Canadian legislation is not applicable to defined intra-provincial transactions of some organizations where that province has "substantially similar" legislation to PIPEDA. The Quebec *Act Respecting the Protection of Personal Information in the Private Sector*, the British Columbia and Alberta *Personal Information Protection Acts* and the Ontario *Personal Health Information Act* are expected to be declared "substantially similar" by the federal Cabinet. These Acts therefore govern disclosure requests in those provinces. In practical terms, an organization in compliance with these Acts will generally be in compliance with PIPEDA. In all other provinces and territories, the federal legislation PIPEDA applies. These pieces of legislation apply to all personal information, including personal health information about an identifiable individual collected, retained, used, or disclosed in the course of commercial activities. This could include responses to items, test results, test data, reports, name, age, and gender of each client who has been administered an assessment by you, the qualified purchaser of an assessment.

Under PIPEDA, Principal 4.9 states that upon request, an individual must be informed of the existence, use, and disclosure of his or her personal information and must be given access to that information if requested. **Section 9(3)(b) is an exemption provision stipulating that you are not required to give access to personal information if to do so would reveal confidential commercial information. However, under certain circumstances, access is permissible if the confidential commercial information is severable from the record containing any other information for which access is requested. In all cases, the requested information shall be provided or made available in a form that is generally understandable to the client.** Section 23 (b) in the BC Act and Section 24 (2) (b) in the Alberta Acts contain a similar "confidential commercial information" exemption as described above. The Quebec Act does not contain such an exemption; however, release of personal health information may be refused on the basis that release would bring serious harm to the client, third party, or public safety, and would reveal third party personal information. Unlike PIPEDA and provincial legislation, the new Ontario Personal Health Information Act, 2004 effective November 1, 2004, at Section 51(1)(c) provides that an individual's access rights do NOT apply to a record that contains "raw data from standardized psychological tests or assessments," unless reasonably severable. Access can also be refused on the basis that access may cause serious bodily harm.

Regarding the release of such material to individuals who claim access rights under PIPEDA and provincial legislation, we advise that Test Materials fall outside the definition of "personal information" since these materials are not "about" the individual and are thus not releasable to a client.

Even if Test Materials are considered personal information and thereby releasable, we advise that our Test Materials are proprietary, copyrighted, confidential commercial information, analogous to trade secrets, and we treat and protect them accordingly. Test Materials thus fall under the exception to release and access under PIPEDA and provincial legislation in order to ensure the ongoing safeguarding of such material. To provide clients with test items, scoring criteria, and other test protocols would be to reveal confidential commercial information on which the scores are based and would render the Test Materials useless. Studies confirm that if test items and test protocols were readily available, the integrity of the test and scoring model could be compromised and would harm the public. There are a limited number of tests for particular purposes that cannot be easily replaced or substituted if made available upon request.

Other jurisdictions such as in the United States have indicated through the U.S. Department of Health and Human Services (HHS) that the similar "trade secret" exemption under HIPAA is applicable to Testing Material which makes the application of the confidential commercial information exemption claim neither *fanciful nor disingenuous in the Canadian context*.

The test publishing industry considers Test Materials to be confidential information and trade secrets and protects these accordingly. To secure and protect Test Materials, MHS and Harcourt Assessment have required, for the past 20 years, the completion of a Test User Agreement which prohibits purchasers from copying and releasing the tests to others who are not qualified to interpret the results or do not have the same ethical obligations to maintain test security, nor have we permitted licensees, distributors, or employees to disclose such material.

The CPA acknowledges that it is in the best interest of the public to protect the validity and integrity of Test Materials. As such, CPA, MHS, and Harcourt Assessment en-

courage you to apply the confidential commercial information exemption under PIPEDA to access requests to ensure the ongoing safeguarding of Test Materials. Release of such material would compromise the validity and utility of the tests with resulting significant negative impact on the health of Canadians, lead to the violation of purchase agreements, and infringe on the intellectual property rights of MHS and Harcourt Assessment. Ontario legislation appears to recognize the inherent difficulty in releasing raw data including test protocols from assessments and has specifically denied access right to this material unless severable from the record.

In accordance with PIPEDA and provincial legislation, MHS, Harcourt Assesment, and CPA's policy supports the release of test results provided that the test results can be severed from the confidential commercial information embedded in the Test Materials and released in an understandable form. This policy permits the release of test results with an explanation of the results in a summary format (such as a feedback summary) that does not reveal the protected test items and other test protocols. Under no circumstances are individuals requesting results or other information entitled to copies of Test Materials.

Upon written request for access and release of Test Materials from your clients under PIPEDA and provincial legislation, the following steps should be followed:

(1)　Provide the client with a detailed description/interpretation of the test results and offer to meet to meet with the client.

(2)　If the client wants a copy of the item booklet, or response sheet that also contain the items, and/or any materials that contain the scoring criteria, algorithm, model, or other test protocols, explain to them in writing that release of these materials is not possible as it will compromise the integrity of the tests and goes against the policy of the CPA and test developers.

　　The requested materials are considered confidential commercial information of the test developers, MHS and Harcourt Assessment,

and are therefore exempt from disclosure under PIPEDA or provincial legislation. Release of such materials may breach the conditions of the Test User Agreements, invalidate the assessment, and/or lead to a violation of intellectual property rights;

(3)　You may release the client's test results provided you are able to remove test items and scoring criteria, or other test protocols that may be attached to the results or within the document, which are considered confidential commercial information. The test results must be issued in an understandable form, such as a summary format. We suggest the provision of a detailed description/interpretation of the test results as stated in step 1, which does not release any confidential commercial information, is sufficient for the purposes of PIPEDA and provincial legislation.

(4)　Contact MHS or Harcourt Assessment for support if the client appeals your decision to deny access and release of Test Materials to the Privacy Commissioner of Canada, Alberta, BC, Quebec, and Ontario as the case may be.

For more information regarding CPA's policy regarding PIPEDA and provincial legislation go to their website www.cpa.ca. For information regarding release of Test Materials in the litigation context see below.

Release of Test Materials in the Litigation Context and Ethical Obligations

We recognize that, given the nature of our legal system, compelling reasons for disclosure of secured testing material may arise. To abide by the terms of purchase, we expect purchasers to do all they can to protect copyright material and to protect the items and scoring criteria as confidential, copyrighted, and trade secret material in response to written requests and/or subpoenas. An exception to releasing test data by a subpoena exists when the qualified purchaser obtains a court order extinguishing, also known as "quashing" or modifying, the subpoena. In this case, we require qualified purchas-

ers to bring to the court's attention concerns regarding test security and to take steps to resolve the conflict in a responsible manner. When faced with a subpoena or court order for the reproduction of Test Materials, you should secure a court order or protective agreement (to the extent possible) containing the following requirements:

(a) restricted access to materials and the testimony regarding materials to the most limited audience possible, preferably only to individuals who satisfy the test publisher's qualification policy;

(b) restricted copying of Test materials;

(c) assurance of the return or destruction of the materials at the conclusion of the proceeding (and confirmation of such return or destruction); and

(d) the sealing of and/or removing from the record to the extent any portion of such materials are disclosed in pleadings, testimony, or other documents in order to safeguard the integrity of the assessments. It is crucial that the Test Materials do not become part of the public record.

In the absence of a protective court order, we do not support the release of Test Materials to unqualified users who do not have an interest in maintaining the security of the test for the reasons stated above. You may wish to consult a lawyer to assist you with the above.

How to Contact Us Re: Test Disclosure

If you have any questions or concerns about the release of protected test materials, please contact MHS by email at privacyofficer@mhs.com or call 1-800-268-6011 (within Canada) or 1-800-456-3003 (within the U.S) or 1-416-492-2627 (outside of Canada & the U.S.); or contact Harcourt Assessments by email at CS_Canada@Harcourt.com or call 1-800-387-7278.

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