

PROTECTING YOUR CONFIDENTIAL INFORMATION

Read this if you have sensitive commercial information to protect.

What is confidential information?

It is information the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential. There is no list of what is, or is not, of this kind.

In law, confidential information is not “property”, like a patent is. You cannot sell it. It cannot be stolen. It can however be protected against a breach of confidence.

Breach of confidence

A court may award you a remedy against another party if you prove:

- the information is sufficiently confidential
- the other party holds that information under an obligation of confidence
- the other party has misused or improperly disclosed the information, or is likely to do so.

We now look at each of these.

Sufficiently confidential?

These factors are relevant:

- the value of the information to you and to others (eg your competitors)
- the time and effort you invested to produce the information
- any steps you took to safeguard the confidentiality of the information
- whether the information is now in the public domain because you widely distributed it.

Obligation of confidence?

A party may hold your confidential information under an obligation of confidence because either there exists a relationship between that party and you where the law implies the obligation (see below), or (depending very much on the facts) the

party ought to have known that the information would be confidential.

The law finds an obligation of confidence in these relationships:

- Fiduciary relationships. A fiduciary is someone on whom the law imposes a duty to act in the best interests of another person. A lawyer owes a fiduciary duty to the client, a trustee to the beneficiary, an agent to the principal, a director to the company, a partner to another partner (though likely not a joint venturer to another joint venturer). The obligation of confidence over information learned during the fiduciary relationship continues even after the fiduciary relationship ends.
- Employment. An employee owes to the employer a fiduciary duty (sometimes called a duty of fidelity), though this diminishes to a duty only for “trade secrets” (a sub-class of confidential information) after the employment ends. The employment contract may expand on this duty, such as to specify what information is confidential and to impose further restrictions on the use of information (including after the employment ends).
- Contract. An obligation of confidence may be imposed by contract (such as a Confidentiality Agreement, sometimes called a Non-Disclosure Agreement) or by a term of a contract (such as in a Franchise Agreement). Contractual rights are particularly useful when dealing with prospective developers, joint venturers, licensees, buyers of the business, venture capitalists.
- Company officers and employees. A person who obtains information because they are, or have been, an officer or employee of a company must not improperly use the information to gain advantage for themselves or someone else, or cause detriment to the company. This derives from the *Corporations Act*.

Improper use or disclosure?

You may prove that this has happened, or is likely to happen or that the information is so sensitive that the court should make an order prohibiting improper use or disclosure anyway.

Remedies

A breach of confidence may entitle you to one or more of these remedies:

- damages for loss
- payment over to you of profits made by the party from their breach
- injunction against future misuse or improper disclosure or requiring the return to you of the information if it is in tangible form (stored electronically or in writing).

What to do

If you take these steps you may prevent a breach of confidence or at least strengthen your right to a remedy if a breach occurs anyway:

- identify your confidential information and also put down in writing your know how
- restrict access to that information in your day to day operations (don't leave it lying around or accessible to casual inspection)
- notify staff of their duty to keep the information secret both during and after they leave service
- impose a contractual duty of confidence on any outsider about to be given access to the information
- act quickly if there is a breach of confidence.

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