

CONFIDENTIALITY AGREEMENTS

In this paper we look at a Confidentiality Agreement (sometimes called a Non-Disclosure Agreement).

These agreements are routine where a business is about to deal with prospective developers, joint venturers, licensees, venture capitalists or buyers of the business. They can also be sought from senior executives of the business.

Purpose

There is no property (in the legal sense) in information.

But the “owner” of it can sue another party for breach of confidence if: (a) the information is sufficiently confidential; (b) the other party holds the information under an obligation of confidence; and (c) the other party has misused or improperly disclosed the information, or is likely to do so.

That right to sue comes from the general law and not from a contract. So it exists even if there is no agreement between the owner and the other party. But it has its problems, and here an agreement can be useful. And the law still allows the owner to sue for breach of confidence despite there being an agreement on the topic between the same parties, so far as the agreement did not override the general law right to sue.

The basic purpose of an agreement is to make it easier to sue in case of bad behaviour. It makes it harder for the other party to argue that the specified information is not sufficiently confidential, or that they do not hold the information under an obligation of confidence. The agreement can also impose detailed rules of conduct that the general law would not. An agreement is worth having.

This paper now looks at the terms that *might* be in the agreement. In this paper, “owner” means the party claiming to be such and “recipient” means the other party. If parties are to exchange information, one party might be (in relation to different information) both an owner and a recipient, so obligations are reciprocated for each other’s information.

Confidential information defined

The agreement will define confidential information, for the purposes of the agreement. Most likely

that definition will be broader than the general law definition.

That may be, for example, any information in any form (visual, oral, by demonstration or inspection) about the owner generally, or perhaps only about an invention or other particular thing.

The definition might include:

- a copy or compendium of the original information
- an analysis, opinion or other material derived from evaluation, examination or testing
- any information the recipient (before or after its disclosure) confirms in writing is confidential to the owner
- the fact and/or content of the agreement itself or that a disclosure was made
- the fact or content of a discussion or negotiation about a potential commercial relationship between the parties.

The definition might exclude information that is either:

- in the recipient’s lawful possession before disclosure by the owner (and sometimes the agreement would require proof of that from the recipient’s written records)
- in the public domain (widely known) other than as a result of a breach of the agreement
- independently developed by the recipient without any reliance upon the owner’s information (again, perhaps only if proved by the recipient’s written records)
- lawfully received by the recipient from a third party who is not obliged to keep that information confidential
- released from the agreement by the owner (usually in writing)

- given in visible form (including email, pictures, diagrams) not marked “confidential”
- given orally or by demonstration and not identified as confidential at the time of disclosure nor in a written summary marked as “confidential” and given to the recipient within say 30 days after the disclosure.

Term

The agreement may govern a disclosure of information before the agreement is signed, during the time of disclosures and for a period (say 3 years) after disclosure. The end time limit allows the recipient to act freely on information it obtained years ago and that is probably no longer confidential. A time limit is however optional.

Disclosure

The owner is not obliged to disclose information, or may break off disclosures at any time.

Warranties

The owner disclaims any warranty that its information is complete, accurate or reasonable and does not infringe the rights of a third party; not unusual if parties are only investigating a potential commercial relationship in the future (because warranties can be addressed in any later contract they make).

Ownership

The agreement does not confer on the recipient any licence or proprietary interest in the information.

Duties not to use or disclose

The recipient must not use or disclose the information except either:

- to investigate a potential commercial relationship or to perform an existing commercial relationship
- a disclosure to people who have a legitimate reason (which might include a client or principal for whom the recipient acts, and their respective staff and professional advisers) and then only to the extent necessary
- as may be required by law
- as the owner may agree (usually in writing).

Detailed duties

The agreement may go on to impose detailed duties on the recipient such as these:

- to use in relation to the information the same procedures it applies to its own confidential information, or reasonable care, whichever is the higher standard
- to mark as “confidential” any of the information held in tangible form
- to keep in a locked safe any of the information held in tangible form
- to keep in encrypted files accessible only by secret password any of the information held electronically
- not to copy or change any of the information held
- in any voluntary disclosure the recipient might make to a third party:
 - o the recipient must notify the party that the information is confidential to the owner; and/or
 - o the recipient must obtain from the party a dated, signed acknowledgement addressed to the owner in terms that the information is confidential to the owner (and retain that for say 3 years or give it to the owner); or
 - o the recipient must notify the owner of the details of the party and the reason for the disclosure
- in any voluntary disclosure the recipient might make to a third party, the recipient is liable to the owner for any misuse or improper disclosure of the information by that third party
- if applicable law (including a court) requires the recipient or person to whom the recipient has disclosed the information to involuntarily disclose any of the information, the recipient must:
 - o take reasonable measures to oppose or restrict such disclosure, or to preserve as far as possible the confidentiality of the information

- o take reasonable measures to permit the owner an opportunity to oppose or restrict such disclosure, or to preserve as far as possible the confidentiality of the information
- if export controls apply to the information (such as under Department of Defence regulations), not to contravene those controls
- if the recipient becomes aware of a suspected or actual breach of the agreement by the recipient or a person for whom the recipient is responsible to the owner, the recipient must:
 - o promptly notify the owner
 - o take reasonable measures to prevent, stop or mitigate the breach.
- when requested by the owner, the recipient must:
 - o return to the owner or (if requested by the owner) destroy any of the information held in tangible form or erase permanently any of the information held electronically
 - o certify to the owner that after a full search of the records of the recipient and the records of any person to whom the recipient made a voluntary disclosure, all required destruction and erasures took place.

Injunction

The recipient may acknowledge that in case of a potential or actual breach of the agreement, the owner may obtain an injunction from a court without proof that the owner has or might suffer actual damage from the breach.

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