

What is Confidential Information?

Confidential information is information that is not publicly available and that the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential (or secret). Confidential information is not property, but you can control access to it, and license its use or transfer it to another person. In some circumstances, confidential information may constitute 'know how' or a trade secret.

How is confidential information protected?

The law offers protection for confidential information under the doctrine of breach of confidence. This means that confidential information is only protected if it is, in fact, confidential and not publicly available, or if it would be difficult for the public to acquire the information except by unlawful means. If the confidential information is disclosed to a third party, it must be made clear that the recipient of the information has the obligation to maintain confidentiality. If this does not occur, the information will not be protected.

It is not necessary to have a written agreement in place covering use or disclosure to receive protection for confidential information. However, it is prudent to require third parties to sign a written confidentiality agreement (also known as a 'non-disclosure agreement') if you plan to disclose the confidential information to them. Use of a confidentiality agreement allows you to set out clear terms that will govern how the recipient of the information may use it, and what his or her confidentiality obligations will be. Furthermore, by requiring third parties to sign a written confidentiality agreement, you can demonstrate that you disclosed the information under confidential circumstances, which will strengthen your case in the event of a future legal dispute.

To determine the appropriate procedures to protect your confidential information, you should assess the risk that someone might obtain the information through industrial espionage. You should also consider how easy it is to obtain the information through reverse engineering or by analysing publicly available information. Finally, you should consider the likelihood and probable consequences if another person were to develop the same invention. In all of these

circumstances, once your confidential information is publicly available, you will lose all rights to control its use or disclosure.

If the risk is high that your confidential information will become public, obtaining a patent may offer a better form of protection for the information, assuming that it would meet the criteria for patentability. Some kinds of confidential information may be patentable (e.g., a new, inventive, and useful device, substance, method, or process), while other classes of confidential information are not patentable (e.g., business information, such as recipes, formulas, business processes, price lists, and customer lists).

If your confidential information is patentable and you elect to pursue patent protection, you must fully disclose the information to the national patent office. In exchange for this disclosure, you will receive a temporary monopoly of 20 years to control the use of the information. However, if it is feasible to keep the information secret and reverse engineering would be difficult, you may prefer to rely on the law of breach of confidentiality. The benefit of this latter strategy is that you can control the information (and receive commercial benefits from this control) for an indefinite period, rather than the limited, 20-year period of patent protection.

Obligations of confidence

The law recognises both express and implied obligations of confidence. An express obligation often arises because of the relationship between the parties. This frequently occurs where a contract governs the relationship, such as in an employment situation or where a confidentiality agreement was signed. Likewise, an implied obligation of confidence may arise where under the circumstances, the other party should have known that the information is confidential.

The law recognises that obligations of confidence exist in the following relationships:

Fiduciary relationships: A fiduciary is someone on whom the law imposes a duty to act in the best interest of another person. Examples of fiduciary responsibilities include the duty that director of a company has to the company, the duty that a lawyer owes to his or her client, and the duty of an agent to a principal. Fiduciaries are obligated to maintain confidentiality for confidential information that they received during the course of the fiduciary relationship, even after the relationship ends.

Employment: An employee owes a fiduciary duty to the employer. An employment contract may expand on this duty by specifying what information is confidential, and by imposing restrictions on the use of confidential information. Employment agreements may stipulate that employees must maintain confidentiality even after the employment ends.

Company officers and employees: A person who obtains confidential information because they are, or have been, company officers and employees must not improperly use the information to gain an advantage for themselves or for someone else, or to cause detriment to the company.

An obligation of confidence does not override other legal obligations. This means that even if you have an obligation of confidence, a court can order you to disclose the confidential information.

Benefits of a confidentiality agreement

There are many advantages to using a clear, concise, written confidentiality agreement. As noted above, the agreement removes any doubt that the information was disclosed under circumstances of confidence. Other advantages include:

- Ability to clearly define the information and the limited purpose for which it can be used;
- Ability to clearly define the rights and obligations of each party;
- Ability to agree upon a notification process to follow if one party receives a subpoena or other legal order that may compel disclosure;
- Ability to specify that threatened disclosure without proof of damage will entitle the disclosing party to seek an injunction to restrain any prospective breach (if this is not included, you would need to prove damage, which can be difficult).

Agreements can also restrict the use or disclosure of information that is not confidential. Such agreements will only be valid or enforceable if the restraint that is imposed and its duration are 'reasonable'.

This fact sheet is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.

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