



Confidentiality Agreements

10 Key Steps

Even without a written confidentiality agreement (also known as an NDA or a non-disclosure agreement) being in place, confidentiality can be imposed as an equitable obligation on the party to whom the confidential information has been disclosed i.e. a duty enforceable at law to act according to a good conscience and in good faith.

In such cases the basic test would be whether:

- a) The information had the necessary quality of confidence about it and the owner must reasonably believe that the information is not already in the public domain;
- b) Was the information passed to the defendant in circumstances imposing an obligation of confidence?
- c) There was an unauthorised use or disclosure (actual or threatened) of that information to the claimant's detriment.

If the above test can be satisfied then, unless the defendant can demonstrate that there was an overriding reason to justify the disclosure, he may well be liable and have an injunction, damages, an account of profits made or other relief ordered against him.

However, although the above may be comforting, nevertheless it is always prudent for a party disclosing confidential information to ensure that there are written restrictions on the use of that information in place before any disclosures are made in the first place in order to:

- (a) Create contractual relations and obligations between the parties so as to not have to rely on the other parties' good conscience/faith;
- (b) Make it more likely to be successful in any action (or threat of the same) as the express clauses contained within the agreement are likely to have created the necessary quality of confidence.

So, now that we have established that a written confidentiality agreement is "a good thing" what are the Ten Key Steps to look out for?

1) Get the parties correct !

This is often where it goes wrong i.e. right at the start!

If dealing with a person representing a company, then make the company a party (and make sure the person signing is authorised to sign it - a simple and inexpensive online CRO search will provide directorship details).

See 5) below.

2) Why are you providing the information?

If this is going to be a “one way street” in terms of you being the disclosing party then no need to muddy the waters with a “mutual” confidentiality agreement

If providing the information with a view to a later joint venture arrangement between the parties then state that within the agreement so that all parties are clear on the purpose of it.

See 4 below.

3) Don't give away the farm!

If trying to keep matters confidential then be careful how much information you give away.

Also see 4) below.

4) Clearly set out the confidential information being provided

The above can take the guise of either a definition of “the Purpose” to which the information is being provided or it can sometimes be seen in the “Background” or in the “Recital” of the agreement.

A clear description is therefore required of the information being disclosed (and why) as one of the factors a Court will take into consideration is whether the owner of the information has treated it as confidential and has made that very clear to the recipient.

Therefore, consider:

- a) what the information relates to;
- b) the purpose of it;
- c) the use to which it may be put;
- d) will it include pre-contract disclosures (written and oral)?

5) Clearly state who may use the confidential information

Is it just for the receiving party, their employees, independent contractors, other group companies? Make it clear in order to focus the others party on how serious (and valuable) you consider your information to be.

6) Length of time the confidential information may be used?

It depends on the industry of course and the reason for the agreement in the first place (see 2) above), but, would 24 or 36 months be enough to realistically protect the confidential nature of the information rather than an indefinite (and unrealistic) term?

7) What happens to the confidential information either on expiry of the

agreement or on breach?

Make sure the agreement covers what happens in the above events so that you either get all the confidential information back or that it is destroyed.

It is of course sensible to keep a tally of what was provided during the course of the negotiations/discussions in order to point to what you want back/needs to be destroyed.

8) Do you own or have the right to provide the confidential information and is it accurate?

Many times a confidentiality agreement will require the provider to provide a warranty (a statement of fact the breach of which could mean breach of contract and entitle to other party to damages for losses suffered) that:

- a) the discloser is entitled to provide the confidential information (either through ownership or permission); and
- b) it is accurate (clearly this should be watered down if you are unsure or cannot say at that time etc).

9) Use the KISS method i.e. Keep it Simple Stupid !

If matters are only at a very preliminary stage then you might (likely in fact) frighten off the other party if you whack down a 20 page agreement on the table on first meeting them!

If preliminary discussions are just being held then a simple one page letter will be sufficient. If matters progress and more substantial information is being provided, then it would not be unreasonable to then have a more substantial agreement in place.

However, apart from the “legal side”, commercially speaking it is always sensible to try and keep it as short and as simple/easy to read as possible in order to get it agreed quickly.

Be prepared for the other side to refuse to sign a confidentiality agreement. This is especially true of VCs, and, although arguments are sometimes convincing please see 3) above!

10) Governing Law and Jurisdiction

If one of the parties is based outside of the Republic of Ireland then try and ensure that the governing law is Irish and that jurisdiction is also within the Republic of Ireland as otherwise the costs will escalate massively.

I would however add that if you are dealing with a proposed later joint venture arrangement or the other side is just a bigger fish then although you may have a good argument it is sometimes impossible to win it.

Summation:

A well drafted confidentiality agreement confirms that information is being disclosed in confidence; it identifies the company which, and often individuals who, will have access to the information; and it identifies the information in question. It is these three fundamental elements that are often not appreciated/missed by business people who are keen to get on and “do the deal”.

Please also bear in mind that although a wrongful disclosure that puts your confidential information into the public domain may entitle you to a breach of contract or a claim in equity

it will be genuinely expensive (genuine apologies to any litigators reading this) and time consuming to pursue it and therefore prevention of disclosure in the first place should be the objective and a succinct and well drafted confidentiality agreement is the first stop on the journey.

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