

WHAT IS A CONFIDENTIALITY AGREEMENT?

The Confidentiality Agreement, sometimes called Non-Disclosure Agreement, is a contract template used to protect sensitive technical or commercial information from disclosure to others. Such agreement is often used when a company or individual has a secret process or a new product that it wants another company to evaluate as a precursor to a comprehensive [Manufacturing License Agreement](#) or [Technology Transfer Agreement](#). Or, perhaps one Party wants to evaluate another's existing commercial product for a new and different application.

There are many models of [Confidentiality Agreements](#); each company tends to treat its own confidentiality agreement with great pride and possessiveness, which causes delays, discussions, negotiations and higher transaction costs.

FUNCTIONS OF THE CONFIDENTIALITY AGREEMENT

Confidentiality agreements perform several functions:

- They protect sensitive technical or commercial information from disclosure to others. One or more participants in the agreement may promise to not disclose technical information received from the other party. If the information is revealed to another individual or company, the injured party has cause to claim a breach of contract and can seek injunctive and monetary damages.
- The use of confidentiality agreements can prevent the forfeiture of valuable patent rights. A properly drafted confidentiality agreement can avoid the undesired—and often unintentional—forfeiture of valuable patent rights.
- Confidentiality agreements define exactly what information can and cannot be disclosed. This is usually accomplished by specifically classifying the nondisclosable information as confidential or proprietary. The definition of this term is, of course, subject to negotiation. As one would imagine, the company or individual disclosing the confidential information (the "discloser") would like the definition to be as all-inclusive as possible; on the other hand, the company receiving the confidential information (the "recipient") would like to see as narrowly focused a definition as possible.

Example of Confidential Information Clause

For the purposes of this Agreement, Confidential Information shall be considered to be any information which could possibly be disclosed in speech, in writing or by means of any other tangible or intangible medium or format, currently known or which could be invented in the future, exchanged between the Parties as a result of this Agreement, and which either one of the Parties might consider to be confidential and might so convey it to the other Party.



[*Optional paragraph*] Attached hereto as Annex 1 of this Agreement, the Parties have included a "List of Confidential Information Elements" which shall be disclosed to the other Party, following the signing of this Agreement. Subsequently, the Parties will be able to add other Confidential Information Elements to the aforesaid list, and such elements shall also be considered thus for the purposes of the object of this Agreement.

TYPES OF INFORMATION

The type of information that can be included under the umbrella of confidential information is virtually unlimited. Any information that flows between the parties can be considered confidential—data, know-how, prototypes, engineering drawings, computer software, test results, tools, systems, and specifications. This list is certainly not exhaustive but does illustrate the breadth of items that can be deemed confidential.

Most confidentiality agreements exclude certain types of information from the definition of confidential information. It is very important that the recipient include these exceptions in the confidentiality agreement. Some commonly employed exceptions are information that the recipient can demonstrate that they had prior to receipt from the discloser, information that becomes known to the public through no fault of the recipient, information that becomes known to the recipient from a third party that has a lawful right to disclose the information, information that was public knowledge before the disclosure of the information to the recipient, and information independently created by the recipient.

INFORMATION TREATMENT

The confidentiality agreement can also limit each party's use of the confidential information. For example, the confidentiality agreement can specify that the confidential information is to be used only to evaluate the discloser's product and cannot be used in the recipient's business.

An important point that must be covered in any confidentiality agreement is the standard by which the parties will handle the confidential information. Usually, each party will treat the other's confidential information in the same way that it treats its own. However, this treatment is acceptable only if the recipient has set standards for handling confidential information, such as limiting access to the information or other methods of preserving secrecy. Therefore, before signing a confidentiality agreement, it would be prudent to investigate the recipient's practices regarding maintaining secrecy of its own information. If those practices are substandard or even nonexistent, the confidentiality agreement should contain specific provisions concerning limiting access to the confidential information (e.g., clearly marking the information "confidential").

PERIOD OF TIME

The agreement must establish a time period during which disclosures will be made and the period during which confidentiality of the information is to be maintained. Some poorly drafted confidentiality agreements will only specify one of these time periods. Furthermore, even if both time periods are specified, it is important to make sure that a starting point is established for the time period during which confidentiality of the information is to be maintained. If this starting point is not set forth, problems can occur down the road. For example, imagine a confidentiality agreement that specifies that disclosures will be made over a two-year period and that the information must be kept confidential for three years. No starting point is specified for the confidentiality term. If a company receives the confidential information on the day before the disclosure term ends, does the company have to keep the information confidential for three years from that date or for one year from that date? Obviously, it is to the recipient's advantage to make the confidentiality time period start with the beginning of the disclosure time period, whereas it is to the discloser's advantage to make the confidentiality period start with the date of disclosure of the confidential information. The point is that the confidentiality agreement should specifically state the starting date for the confidentiality time period in order to avoid any ambiguity.

In conclusion, there are several situations where a confidentiality agreement is appropriate and may be proposed. Knowing a few basic points concerning confidentiality agreements can ensure that the important purposes they serve will not be defeated by ambiguities or ignorance of the meaning of terms used in the agreement.



To obtain the Confidentiality Agreement Template click here:



[CONFIDENTIALITY AGREEMENT TEMPLATE](#)

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