



Confidentiality Agreement

EXECUTIVE SUMMARY:

A confidentiality or non-disclosure agreement is crucial for an inventor or any other party who needs to protect confidential information. As the importance of the confidential information increases, so does the relative complexity of the Agreement. This page presents the basic elements of a non-disclosure agreement, but does not describe the more complex elements that would be required in a larger agreement.

One typical use of a non-disclosure agreement is to allow an inventor to share information about their invention before a [patent](#) has been obtained. Because patent applications must be filed within [one year of the first public disclosure](#) (in the United States) and before any public disclosure (in much of the rest of the world), it is often necessary to ensure that all discussions about the invention with potential investors and purchasers are made only under the terms of a confidentiality agreement. For many, the need for a confidentiality agreement lessens once a [patent application](#) has been filed on an invention. In other situations, the confidential information does not relate to a patentable invention at all. In these circumstances, the non-disclosure agreement serves to prevent disclosure of confidential information as well as unauthorized use of that information by the recipient.

IMPORTANT ELEMENTS:

- **Definition of Confidential Information.** The most important part of the confidentiality agreement is the definition of Confidential Information. Ideally, the contract should set forth as specifically as possible the scope of information covered by the agreement. The disclosing party may be reluctant to describe the information in the contract, for fear that some of the confidential information might be revealed in the contract itself.
- **Explanation of Purpose for Disclosure.** Confidential information is only revealed to another party for a specific purpose. The agreement should set forth what the purpose is.
- **Disclosure.** Many confidentiality agreements do not have a disclosure provision. This provision states that in return for agreeing to keep the information confidential, the Recipient has the right to receive the information. Since this puts a duty on the Discloser to disclose its confidential information, the Discloser should carefully consider the scope of any such provision.
- **No Disclosure.** The Recipient must agree not to disclose the information to third parties. The extent of this provision to a large extent controls the "strength" of the non-disclosure agreement. Typical disclosure provision issues that may be faced in drafting and negotiating a confidentiality agreement include:

- whether or not to include a "best efforts" clause,
 - whether to limit access of Recipient employees to a "need to know" basis, and
 - whether Recipient should merely agree to protect the confidential information in a manner similar to the way the Recipient protects its own confidential information.
- No Use. Some non-disclosure agreements forget this important element. The Discloser wants to make sure the Recipient does not use the information for any purpose other than that set forth in the agreement.
- Limits on Information Deemed Confidential. Practically every non-disclosure or confidentiality agreement puts some limits on the type of information that will be deemed confidential. For instance, if the Recipient already knew the information before it was revealed by the Discloser, or if the information was revealed to the Recipient by a third party, that information will not be treated as confidential under the agreement. Other possible limits include information that becomes publicly known, information that is requested by order of a government agency, or information that is independently developed. The Discloser may require a certain level of proof before such information is considered non-confidential.
- Term. The term provision of a confidentiality agreement can be extremely important. The term must be long enough to protect the interests of the Disclosing party. Nonetheless, the term should not unduly burden the Recipient. Example term provisions would have the agreement last one or five years. Alternatively, the agreement could last indefinitely, as is shown in the example contract.
- Other Provisions. Other provisions that are commonly found in confidentiality agreements include:
 - a provision allowing the remainder of an agreement to stay in effect even if a portion of the agreement is found to be unenforceable,
 - a provision stating that the agreement is binding on heirs and assigns,
 - a provision calling for a return of confidential materials after use by Recipient,
 - a provision stating that the Discloser has the right to receive an injunction from a court if the agreement is breached,
 - a provision specifically specifying that the Discloser owns all confidential information,
 - a provision specifying that disputes should be arbitrated, and
 - a provision governing the controlling law for the contract.