

Legal issues

The key legal issues to consider in the context of confidentiality agreements are set out below.

1) Limitations of confidentiality agreements

a. Remedies for breach and practical steps

i. The discloser should be aware that a confidentiality agreement cannot provide an absolute guarantee that the disclosed information will be protected. A confidentiality agreement has limitations, particularly where the recipient has little intention of complying with its obligations under the agreement. If a recipient uses or discloses confidential information in breach of the confidentiality agreement, it may be too late, or at the very least, prohibitively expensive, for the discloser to seek a meaningful remedy:

1. An injunction (to stop any unauthorised disclosure or use of the information) is the first choice of remedy if the discloser discovers the recipient's intentions before it breaches the confidentiality agreement. After the breach, an injunction may be of little or no use. Once the information has entered the public domain, there is no legal remedy that will make it secret again.

2. Damages for breach of contract (or a claim for an account of profits where the recipient has made use of the information) may not be an adequate remedy, especially where the confidential information has potential future value rather than value today.

3. Proving that there has been a breach of confidentiality agreement can often be difficult.

4. Even where the recipient is honest and acting in good faith, it will inevitably be influenced by the disclosed confidential information, whatever the terms of the confidentiality agreement.

Given these limitations, a discloser should, in addition to entering into the agreement, put practical measures in place to protect the information. For
iii.

Whether or not the first party is successful in securing the inclusion of an indemnity in the agreement will depend on a number of factors, including

the prevailing market conditions and the relative bargaining strength of the parties.

e. Legal restrictions on disclosure of information

i.

The parties need to be aware that legal restrictions may prevent the disclosure of certain information to each other. For example:

1. Parties who are government contractors may be subject to restrictions under official secrecy legislation.
2. A party may be under a confidentiality obligation owed to a third party. For example, a contractual confidentiality clause in that other contract.
3. Personal information may be protected under the data privacy laws.
4. UK and EU competition law and Article 101 of the Treaty on the Functioning of the European Union (formerly Article 81) of the EU Treaty) may prohibit the disclosure of competitively sensitive information between the parties if they are competitors.

f. Public bodies: Freedom of Information Act 2000 and the Environmental Information Regulations 2004

i. Public bodies are obliged by the Freedom of Information Act 2000 (FOIA) and the Environmental Information Regulations 2004 (SI 2004/3391) (EIR) to disclose certain information on request to anyone asking for it, subject to various exemptions. This includes information belonging to a third party which is held by a public authority, even if the third party imposed confidentiality obligations on the public authority.

ii.

So, a private entity who enters into a confidentiality agreement with a public authority should be aware that the information it provides to the public authority pursuant to that confidentiality agreement may be disclosed if that public authority becomes subject to an FOIA or EIR request. Note that the FOIA and the EIR do not oblige a public authority to give notice to, consult, or inform third parties that may be affected by a disclosure before making that disclosure. However, it is good practice for a public authority to do so. A public authority may be prepared to agree to make reasonable

endeavours to notify the third party that they have received a request for information affecting that party.