



# Intellectual Property

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## What is Confidential Information?

Confidential information is information that is "secret", in the sense that it is not known to the general public or competitors and is not in the public domain. Any secrets

whether personal or commercial can be confidential information. In the commercial context, confidential information is often in the nature of a trade secret such as formulae, processes, new inventions and business strategies.

Trade secrets usually provide the owner with significant competitive advantage. The Coca Cola formula is an example of a valuable trade secret.

### **Risk of Loss of Protection**

If you have information of competitive value that is capable of being kept confidential, it is essential to ensure that appropriate security and protection is set up. In addition, confidentiality can

offer protection where other intellectual property protection such as a patent is not possible or appropriate. Confidentiality can in most cases be retained indefinitely if the information will not by its normal use be made public. This can be extremely valuable for secret processes.

Confidential information is no longer protected if it becomes publically known and/or freely available. The more sensitive and valuable the information, the more restrictions on its use and disclosure should be in place. The most common defences to a breach of confidence are that the information was not confidential and that no obligation of confidence existed. A signed non-disclosure or confidentiality agreement can limit this type of defence.

Where any disclosure is made, it should be accompanied by a statement that the information is confidential and which imposes a limit on use and

disclosure to the specific purpose for which it was provided.

To ensure optimum protection of your valuable confidential information, you should have policies and procedures in place to prevent unnecessary and unauthorised disclosures of confidential information. Simple measures which will assist in protecting confidential information include:

- ♦ marking confidential documents as "confidential" and including a confidentiality notice on such documents;
- ♦ keeping confidential documents in a secure/access restricted place;
- ♦ disposing of confidential documents by an appropriately secure destruction method;
- ♦ only disclosing confidential information to persons who have a need to know the information;
- ♦ ensuring that employees, contractors and consultants are bound by confidentiality undertakings in their contracts; and

- ♦ when disclosing confidential information to any person, ensuring that it is in circumstances which impose an obligation of confidence. Where appropriate, a non-disclosure or confidentiality agreement should be entered into.

## How is it Protected?

Confidential information receives some protection under the common law action for breach of confidence. This protection derives from the relationship and conduct of the parties.

To establish a claim of breach of confidence, it is necessary to prove that:

- ♦ the information concerned is confidential in nature;
- ♦ the information was disclosed to the recipient in circumstances which impose an obligation of confidence; and
- ♦ the recipient has made unauthorised use of that information.

The law in New Zealand is not yet settled as to whether the disclosing party must prove detriment resulting from the recipient's use.

## Advantages of Using a Contract

Confidential information can also be protected by entering into a non-disclosure or confidentiality agreement (or by having specific clauses imposing confidentiality obligations in contracts or agreements that deal with additional matters). The agreement will usually set out the limitations on the recipient's use and/or disclosure of the confidential information. Where there is a non-disclosure or confidentiality agreement in place, a breach of the specific

obligations can be pursued as a contractual breach. Having a written agreement in place involves the recipient acknowledging the sensitivity of the confidential information and also often acts as a deterrent to the recipient disclosing the information without permission.

The existence of the agreement can also be used to show that the confidential information was disclosed in circumstances which impose an obligation of confidence. If there is no written agreement in place, whether or not the circumstances of disclosure are such that an obligation of confidence is imposed will be a question of fact and will depend on the nature of the relationship between the parties and the type of information disclosed.

It is, however, important that an appropriate form of non-disclosure or confidentiality agreement is used. A poorly drafted agreement may not provide the necessary protection and could even limit the extent of common law protection.

## Optimum Protection

To achieve optimum protection for your confidential information, you should seek advice from a legal professional skilled in intellectual property matters.



*This newsletter is produced by Simpson Grierson. It is intended to provide general information in summary form. The contents do not constitute legal advice and should not be relied on as such. Specialist legal advice should be sought in particular matters.*

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