Confidential Information / Trade Secrets

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Confidential information, also known as trade secrets, is information that is not publicly available and that the law protects from misuse or improper disclosure by a person who is under an obligation to keep it confidential (or secret). Confidential information is not property, but you can control access to it and license its use or transfer it to another person. In some circumstances, confidential information may constitute 'know how' or a trade secret. Confidential Information is often considered as an alternative to patenting, which requires public disclosure of the invention and know how in the form of the patent document.

Confidential information is only protected if it is, in fact, confidential and not publicly available, or if it would be difficult for the public to acquire the information except by unlawful means.

Protection for Confidential Information

What to consider to appropriately protect the confidential information:

- Consider if the information should be protected through a written and signed agreement. Use of a confidentiality agreement allows you to set out clear terms that will govern how the recipient of the information may use it, and what his or her confidentiality obligations will be. Although a written agreement is not necessary for the protection of confidential information, it is good practice if you intend to disclose the confidential information to third parties using a 'non-disclosure agreement'.
- Consider how easy it is to obtain the information through reverse engineering or by analysing publicly available information
- Consider the likelihood and probable consequences if another person were to develop the same invention.

If confidential information becomes publicly available by any lawful means, including the circumstances detailed above, all rights to control its use and disclosure will be lost.

Confidential information can be protected by both express obligations between parties as well as implied obligations of confidence.

- Express obligations often occur where a contract governs the relationship, i.e. employment situations where a confidentiality agreement was signed.
- Implied obligations of confidence may arise where under the circumstances, the other party should have known that the information was confidential.
- The law also recognises obligations of confidence exist in certain relationships, including those between an employer and employee and where there is an known imbalance in knowledge, power or skill such as a doctor and patient or lawyer or client.

Why is it relevant?

Confidential information is relevant to researchers because valuable knowledge, such as methods, processes, technical know-how, data, or research strategies, may be protected by keeping it secret. In some cases, maintaining confidentiality allows organisations to preserve their competitive advantage or protect commercially valuable know-how without seeking formal intellectual property rights such as patents. The main benefit is that the confidential information does not expire unless confidentiality is lost. In contrast, patents expire in 20 years.

For researchers and institutions, confidential information may arise in a number of situations, such as in collaborations with community or industry partners, during the development of commercial inventions, or when working with proprietary materials or datasets. Understanding how to identify and manage confidential information helps researchers comply with confidentiality agreements which can be in the form of employment or collaboration agreements, protect sensitive research information, and avoid unintended disclosure.

Practical Steps

1. **Identify confidential information early**
   Confidential information may include unpublished research results, technical know-how, proprietary methods, datasets, or information shared by collaborators, community, or industry partners.
2. **Check agreements before sharing information**
   Employment agreements, research collaborations, industry partnerships, and

material transfer agreements may include confidentiality obligations. Review these agreements and seek legal advice from your institution to understand what information can be shared and with whom.

3. **Avoid unintended public disclosure**
   Presentations, publications, preprints, and informal discussions can disclose confidential information. Ensure that any information subject to confidentiality obligations, express or implied, is cleared for disclosure before sharing.

4. **Use appropriate channels when sharing confidential information**
   When confidential information needs to be shared with collaborators or partners, ensure appropriate arrangements are in place (such as non-disclosure agreements and secure communication channels) and follow your institution's policies for handling sensitive information.

Case Study

Apple has initiated legal action against a former employee accused of stealing trade secrets related to the Apple Watch and sharing them with a new employer. According to the complaint, before resigning the individual allegedly downloaded files containing proprietary information and organised meetings with other engineers to gather additional sensitive material. The case highlights the risk that confidential information can be misappropriated when employees transition between companies and underscores the importance of robust internal safeguards, clear exit protocols, and legal protections. [1]

References

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