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# Myerson **Business**

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**Our guide to Confidential Information Disputes**

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# Welcome

One of the most valuable assets of a business is information. Where this information is confidential in nature it is usually protected by the law of confidence – for example, a secret formula, a method of manufacture or a list of customers and suppliers. From a commercial perspective, certain confidential information could give a company an edge over other competitors. Therefore, it is important to obtain specialist advice to identify and control the flow of confidential information and take necessary legal action where this has been compromised.

## Why Myerson?

At Myerson, our expert solicitors are here to listen, help you and have years of experience in dealing with complex cases relating to misuse of confidential information. Court proceedings relating to misuse of confidential information can be extremely technical and complicated. Due to this, they are dealt with by specialist courts in England and Wales.

At Myerson, we will provide you with swift advice whether you are bringing or defending a misuse of confidential information claim. Given the sensitive nature of confidential information cases, we will always explore all potential legal solutions. These remedies will depend on the specific context of your situation; however, you can be assured that they will be the most effective solutions available

We are proud to be ranked as '**Top Tier**' in the prestigious international directory **The Legal 500** and commended by The Times '**Best Law Firms 2023**'. So, you can be certain that you will receive the highest quality legal advice and that we can advise you on complex copyright issues.



# Confidential Information Disputes

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## What do the laws on breach of confidence say?

The law of breach of confidence preserves trade secrets and confidences. For information to be protected, it must be confidential in nature and disclosed in circumstances imposing a duty of confidence. The basic principle is that a person who has received information in confidence cannot take unfair advantage of it or use it without permission of the owner. To be protected by the law of confidential information, the information must be confidential in nature and disclosed in circumstances importing an obligation of confidence. There is often a crossover with confidential information and other intellectual property rights such as copyright.

Disputes can arise where there has been unauthorised use of information deemed confidential giving rise to a claim for misuse of confidential information which can lead to damages and/or injunctive relief. Disputes can also often arise as to whether the information was actually confidential. Whilst it may be obvious in some cases, such as in the case of a secret formula, in other instances, the information may be similar to that already in the public domain.

## When does an obligation of confidential information arise?

If an obligation of confidentiality arises our expert solicitors are here to help you. An obligation to keep information confidential can be imposed by:

- Contract;
- Implied because of the circumstances of the disclosure; or
- Implied because of the special relationship between the parties concerned e.g. employee/employer or solicitor/client.



# What practical ways are there to protect confidential information?

There are two aspects to protecting information under the law of confidential information in the UK:

- Ensuring that information is only disclosed in circumstances importing an obligation of confidence; and/or
- Ensuring that access to information is restricted.

The best way of protecting confidential information is to enter into a stand-alone confidentiality agreement before the confidential information is disclosed. This avoids the question of whether the recipient was on notice that the information was being disclosed in confidence and also, a contractual obligation is easier to enforce than a claim under the general laws relating to confidential information. Our Commercial team can advise on the drafting and implementation of such confidentiality agreements. Please let us know if you would like more information about this.

As well as ensuring that recipients sign a confidentiality agreement before releasing confidential information, there are a number of practical steps that holders of confidential information can take to establish and maintain confidentiality:

- Restrict access to confidential information. Make sure that information is disseminated on a need-to-know basis and that documents are marked as “confidential”. Although please note that indiscriminate labelling could devalue the term.
- Restrict access to areas where confidential processes are conducted, or developments are being made.
- Keep a contemporaneous written record of developments.
- Consider staggered disclosure when making disclosures in the context of negotiations, that is, hold the “crown jewels” back until you have reached an advanced stage of proceedings.
- Consider disclosing hard copies of confidential information, which can be numbered and collected when no longer required for the particular project or transaction concerned.
- Ensure that employee contracts contain clear and appropriate confidentiality provisions.
- Implement firm-wide policies in relation to know-how and data protection.



- Give employees practical guidance about keeping information confidential. Examples might include advising employees not to discuss company business on public transport, in lifts, or at trade shows or conferences, and to take care when using laptops or mobile devices in public places like trains or cafes.
- Provide training to employees about IT issues, such as the metadata which is left in tracked and revised documents. Many revision mode programs will reveal the name of the person making the revisions, and the date and time the revision was made. In addition, previous changes may be hidden away in the document where they can be accessed by unauthorised parties. A way of avoiding this is to save the changes in a new document or to use a PDF document instead.
- Ensure that security is appropriate: both physical security and electronic security such as firewalls, secure e-mails or encryption. Consider using techniques to prevent USB keys being used with company computers and ensure that there are appropriate restrictions or policies in place to deal with those who use their own devices.
- Keep records that show what projects each employee or consultant has worked on.
- Remind departing employees and consultants of their obligations of confidentiality and ask them in writing to confirm that they have returned all company property.
- Audit security procedures frequently.

## What practical ways are there to protect confidential information?

Confidential information can be protected for as long as it remains confidential which, in theory, could be forever. However, there are a number of restrictions to this:

- Information which becomes out of date and which ceases to have any commercial value;
- Confidentiality agreements which are time-limited;
- Time-limited restrictive covenants in an employee's employment contract; and
- Technical information provided to public authorities for securing regulatory approval are typically time-limited.



Examples of confidential materials which may be protected:

- Formulas not capable of analysis in the final product;
- Recipes which are not apparent from the final product;
- Processes;
- Business methods (until they are used in public);
- Financial and statistical information;
- Customer lists;
- Plans, sketches and drawings;
- Improvements to products or processes;
- New inventions whilst a patent application is pending;
- Business plans;
- Computer programs; and
- Discoveries, scientific theories or mathematical methods.

## When will a party want to disclose confidential information?

A party may want to disclose confidential information in the following circumstances:

- For a general commercial purpose. This will usually be a project or transaction that the parties are considering undertaking together. For example, the parties are entering into discussions as a prelude to negotiating a supply of services agreement, or the parties intend to bid together for a particular business opportunity.
- As part of exploiting that information commercially, for instance, by licensing it to third parties.
- As part of negotiations leading towards the conclusion of an acquisition agreement.
- To its employees so that they can carry out their role properly.





# What remedies do I have if my confidential information has been misused?

A successful claimant in an action for misuse of confidential information is potentially entitled to:

- An injunction; and/or
- An account of profits or an inquiry as to damages.

Injunctions are usually the first choice of remedy if the claimant finds out that the defendant is going to misuse or misappropriate the confidential information before the misuse or misappropriation takes place. In this situation, the claimant may seek an injunction to prevent the defendant from disclosing or using the information. However, an injunction will be of little use or no use once the confidential information has been disclosed or used.

The Court is able to order an interim injunction to preserve the status quo pending a trial on the merits of the case. There is also the possibility of seeking a search order which can be particularly useful in the case of fraud in the context of the protection of intellectual property. A search order is a type of interim mandatory injunction which requires the defendant to allow the claimant's representatives to enter the defendant's premises and to search for, copy and remove documents or material.

Where final injunctions are concerned, the Court will be careful to balance public interest in promoting trade and commerce by free competition among commercial concerns against the need to protect commercially sensitive confidential information and therefore, prevent unfair competition through their unauthorised disclosure or misuse. The Courts have shown a willingness to issue (and continue) injunctions to stop the misuse of confidential information, and also for the destruction of confidential information.

The usual measure of damages is that the defendant should compensate the claimant for the loss which the defendant has caused the claimant. If the claimant would have used the information themselves to earn profits, the correct measure of damages is that the claimant should receive fair compensation for what it has lost. If, on the other hand, the claimant would have licensed or sold the confidential information to others, the correct measure of damages is the market value of the confidential information on a sale or licence between a willing seller and a willing buyer.



# You're in safe hands!

If you would like further information about how we can help you with **Confidential Information Disputes**, or if you have any questions, please don't hesitate to contact a member of our **Commercial Litigation Team** today.

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