Checklist: essential elements of a basic confidentiality agreement

QUESTIONS TO CONSIDER AND SPECIFY IN THE AGREEMENT

- What information is to be considered “confidential information”?
- For what specific purpose will the information be supplied?
- Are there to be any exceptions to the definition of “confidential information”?
- Are there to be any disclosures of confidential information that will be specifically permitted or allowed?

POSITIVE STATEMENTS TO BE MADE BY THE DISCLOSER OF CONFIDENTIAL INFORMATION

(If applicable, and depending upon the particular circumstances)

That:

- disclosure is not intended to transfer any rights in such information;
- there is no exclusivity to the Recipient in the confidential information;
- there is no obligation upon the Discloser to provide confidential information;
- the supply of confidential information does not constitute an offer; and
- no warranty is given about the accuracy or completeness of the information.

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STATEMENTS OF THE OBLIGATIONS OF A RECIPIENT OF CONFIDENTIAL INFORMATION

The Recipient of any confidential information:

- shall use all reasonable measures to keep the information confidential;
- shall be responsible for any unauthorised disclosure;
- indemnifies the Discloser for loss arising from Recipient’s breach of the agreement (this is optional requirement and can often be the subject of lively debate);
- acknowledges that breach of the agreement may cause loss to the Discloser;
- shall return all confidential information on demand; and
- agrees not to solicit or approach employees, customers or suppliers.

BOILERPLATE ITEMS

(COMMON CONTRACTUAL TERMS)

- Term of the agreement.
  - For how long is the agreement to be in force?
  - When does it start?
  - When does it end?

- Governing law and jurisdiction.
  - Under what state or country’s law will the agreement be enforced?