



Take steps to protect confidential information

Wed Apr 4 2007

On the Cutting Edge/Brian Bowman

IMAGINE the following scenario. You begin negotiations with another organization to explore a potentially lucrative business opportunity. In the course of your discussions you disclose confidential information about your business to the other organization.

But when the negotiations break down, you realize that you have disclosed valuable information that might now be used by the other organization for their own purposes. Regrettably, you did not require them to sign a confidentiality agreement. This scenario happens more often than you may think and it is entirely preventable.

Clearly, organizations need to share confidential information from time to time prior to and during business relationships.

A confidentiality agreement, often called a non-disclosure agreement, is a contract typically signed between two organizations to keep sensitive information secret and limit its use for defined purposes. It gives you the peace of mind to enter into discussions with another organization and, with the benefit of a legally enforceable agreement, disclose sensitive information that may include intellectual property such as trade secrets, business plans or client information -- all vital information that must be kept private.

Having a confidentiality agreement in place during the initial stages of any negotiations with other organizations, however, should be a standard business practice. Even where entering into such contracts is a standard business practice, it is crucial that they be customized to fit the requirements of any relationship on a case by case basis.

What are key questions to be answered in a confidentiality agreement? What is defined as "confidential information"? Who is covered by the contract? Does it apply to the other organization's independent contractors and agents? Are the terms of the contract one-sided or do they apply to both parties? What can confidential information be used for and to whom may it be disclosed? What safeguards are required to protect the information? How long is the term of the contract and what happens to information afterwards?

Sometimes I am asked by clients -- especially small- and medium-sized businesses - - whether confidentiality agreements are worth the paper they are written on. The

rational is that even though a confidentiality agreement may be signed, it requires deep pockets to enforce its terms in court if they are violated by the other organization.

While this concern should not be entirely discounted, there are many competitive reasons to use such agreements in the regular course of business.

Presenting another organization with a confidentiality agreement demonstrates at the outset of any relationship your sophistication and business savvy. Doing so can have the effect of demonstrating one's professionalism, value for intellectual property and due diligence.

It can also turn everyone's minds to the issue of confidentiality so that a violation does not occur in the first place. If, however, the other organization violates the terms of a confidentiality agreement then you have the benefit of a written, legally enforceable contract.

Finally, if you have reason to believe that the other organization is contemplating breaching your confidentiality, you can go to court to try to obtain an injunction.

For these reasons and others it makes good sense to proactively leverage customized confidentiality agreements as a standard business practice.

Why use confidentiality agreements?

- * to demonstrate business savvy
- * to prevent loss of confidentiality
- * to enforce terms if necessary
- * to seek an injunction if required.

Brian Bowman is a business lawyer with the Information & Ideas Group of Pitblado LLP. He can be reached at (204) 956-3520 or bowman@pitblado.com.

© 2007 Winnipeg Free Press. All Rights Reserved.