



Understanding Trade Secrets and Confidential Information

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The logo for Elavon, featuring a stylized blue and grey graphic above the word "Elavon" in a black serif font.

Elavon

The logo for Seyfarth Shaw, with "SEYFARTH" in a blue serif font above "SHAW" in a black serif font, separated by a thin horizontal line.

**SEYFARTH
SHAW**

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Trade Secrets and Confidential Information

- Confidential
 - Information that you will share if appropriate safeguards are in place
- Trade Secrets
 - Information that you don't share with anyone outside your organization and restrict access to in your organization

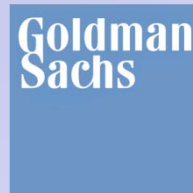


Trade Secrets

➤ Recipes



➤ Algorithms or Source code



➤ Formulas



Distinguishing Features

- Economic value
- Reasonable measure to protect secrecy
 - ✓ Need-to-know access
 - ✓ Encryption
 - ✓ Employee training
- The “crown jewels” of a business

Confidential Information

- Customer/donor lists
- General financial information (P&L statements, proposals)
- Marketing information
- “Negative know-how” what doesn’t work
- Pricing proposals

Distinguishing Features

- Information that is important to your organization and not generally known
- Information about an organization, not how the organization works
- Information that falls short of a trade secret but nevertheless would be detrimental to your organization if it got into a competitor’s hands.

Major Changes

- Federal right of action for misappropriation
- Expansive remedies: ex parte seizures
- Whistleblower immunity
- Supplemental, not exclusive, claim

Takeaway

- Very powerful, but trade-secret litigation is very expensive
- Ex. Zillow spent \$42mm prosecuting ONE trade-secrets dispute in 2015-16
- Update NDAs and standard agreements to include DTSA whistleblower notification

Identify your trade secrets

- What are the “crown jewels” of your organization?
- BYOD policies
- Onboarding and offboarding
- Security measures: encryption, limited access



Identifying Confidential Information

- Written materials marked “confidential”, “proprietary”, “recipient’s eyes only” or similar.
- Materials presented in writing with either prior notice that they are confidential or written notice after presentation that they are to be treated as such.
- Materials that to the recipient or an uninformed third party should reasonably be identifiable as sensitive, confidential or just not for public consumption.

Confidentiality (a.k.a. Non-disclosure) Agreements

- Clearly describes: the purpose of the disclosure and what the recipient can do with the materials; what does and what does not comprise confidential material.
- Period of confidentiality (1 year, 5 years, 10 years..) should be finite period except for personally identifiable information and trade secrets (protected “in accordance with applicable law”).
- Conditions for storage, return or destruction (and what to do with materials recipient cannot return or destroy).
- Governing law and venue for any disputes (this does matter).
- Disclaimer of accuracy and no obligations to contract for substantive business relationship.

Negotiating NDAs – Top 5 Pitfalls

- Make sure it covers your materials (i.e. the NDA is mutual);
- Provides for electronically archived information (not feasible to retrieve or wipe from backup systems);
- You may need to retain one copy for your own regulatory compliance purposes;
- Make sure your systems can support your obligations (e.g. return; security of access to third parties);
- Government parties – FOI Act provisions.



For More Information:

If you would like more information about the services of Pro Bono Partnership of Atlanta, contact us at:

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