



NEW YORK UNIVERSITY
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OFFICE OF GENERAL COUNSEL MEMORANDUM

CONFIDENTIALITY AGREEMENTS: PITFALLS TO CONSIDER

It is not unusual that prior to a meeting to discuss a potential transaction, a visiting company, such as a commercial vendor or potential research sponsor, will provide NYU with the company's standard confidentiality agreement to protect the confidentiality of potential disclosures made during the meeting. Although these confidentiality agreements (sometimes called confidential disclosure agreements or "CDAs") often appear innocuous or "boilerplate," their provisions can have serious consequences to the University, and may impact the ability of the University and its faculty, researchers and other personnel to engage in programs or activities related to matters that are discussed. These agreements should be reviewed by the Office of Sponsored Programs or the Office of Industrial Liaison in the case of research agreements, or by the Office of General Counsel in other cases. Generally, CDA's must be signed by a person authorized to sign on behalf of NYU. Here are some of the important considerations to keep in mind regarding these agreements:

1. Purpose of the CDA. The agreement should clearly describe the purpose for the disclosure: is it for a specific business relationship or research project? Whatever the stated purpose, it ordinarily should be very specific, and not too broad.
2. Limiting the Nature of the Information Disclosed. It is important to have a general sense of the type of information that may be disclosed and to limit the CDA to those documents and to a specific technical or business field. Receipt of information deemed by a company to be confidential that is not necessary to assess the relationship may foreclose or inhibit future activities of NYU. For instance, NYU may wish to receive information specific to a unique technical or scientific issue; however, because of NYU's own proprietary research efforts, NYU may wish to avoid receiving information in related areas where receipt of such disclosures may compromise the integrity of NYU's own efforts. Similarly, if NYU is considering entering into a type of business venture, receipt of information pursuant to a CDA may compromise NYU's ability to choose a

different partner or to conduct the enterprise without a partner. Accordingly, care should be taken to ensure that the scope of disclosure is not too broad. In fact, in some instances, NYU may wish to initially receive a non-confidential "preview" of the proposed disclosures so that NYU can determine whether it even wishes to receive such disclosures.

3. Knowing What We Are Obligated to Protect. When NYU receives confidential information, it is essential to have a clear understanding of exactly what it is we are to protect. Wherever possible, all such information NYU is to protect should be marked or stamped "CONFIDENTIAL." If information is not required to be marked (or stamped) "CONFIDENTIAL," it can be very difficult to know the bounds of confidentiality. This is especially true with oral or visual disclosures. To best protect NYU, disclosures to NYU that are oral or visual should be summarized in writing by the disclosing party, and the summary provided to the recipient within a reasonable period after the time of disclosure. It is worth noting that many agreements now include "catchall" language that NYU is obligated to protect "what a reasonable person would know should be confidential." This is a vague standard, and can put NYU researchers and administrators at risk. Usually, companies are approaching researchers because they are expert in their fields. The burden should not be on NYU researchers to decide what is reasonably considered confidential by a particular company. If it is important enough for a company to protect, it should generally be important enough for the company to identify.
4. Measures We Are Required to Take In Order to Protect the Information. The goal is to identify reasonable standards for our protection of confidential information – typically this would mean NYU agreeing "to use the same standard of care NYU uses to protect its own confidential information." This language is good because it defines a standard with which NYU knows it can comply. However, often times, agreements require NYU (and, in the case of research agreements, the researcher) to hold documents "in strict confidence," or "use its best efforts" to protect the confidentiality of documents. Such strict language is inadvisable, as a company could construe such vague language to require unreasonably strict standards of security to which the University could not reasonably adhere. It is important to adhere to the standards agreed upon. In any event, to avoid issues later on, the confidential information should be safeguarded and disclosed only to those at NYU who have a direct need to know, and who understand that the information must be maintained as confidential.
5. "One Way" and "Two-Way" Agreements. Typically, the company considers only its desire for protection. Consideration should be given to whether it is only a company who has confidential information, or whether the University also has confidential and/or a valuable information that similarly should be protected.
6. Receipt of Confidential Information. Ideally, a confidentiality agreement should designate a single point of contact for each party covering the transmission or receipt of all confidential information. This creates a manageable environment,

and avoids the possibility that confidential information is transmitted randomly to students, staff or others in the program who are unfamiliar with the legal obligations, and possibly unaware of the existence or terms of the confidential agreement. Having a single point of contact significantly reduces risk that these agreements will be breached by avoiding confusion, inadvertent disclosures, and allowing for better "accountability" under the agreement.

7. Years of Protection. There should be clarity about the maximum length of time that information must be maintained as confidential. Over time, it is very difficult to track information received. Moreover, information that is confidential and sensitive today likely is irrelevant and obsolete in several years. Accordingly, most agreements will limit the duration of time the recipient is obligated to protect the information. The average time period usually is between three and five years. However, the right duration depends upon the specific facts and circumstances involved.
8. End of the Period of Confidentiality. Agreements may have provisions governing NYU's obligations after the agreement is terminated. Oftentimes, there is a requirement that NYU return or destroy the confidential information. The problem with this type of provision is that it creates problems in tracking or proving what NYU received. Accordingly, it is advisable that such agreements authorize NYU to maintain one "archival copy" of the materials NYU received, maintained for the sole purpose of documenting what NYU actually did receive under the agreement.
9. The "Window" During Which the Parties Can Exchange Information. There should be two time periods referenced in the agreement. In paragraph 7 above, we discussed the duration of the confidentiality obligation. However, it also is important to define the length of time, or the "window," during which disclosures can be made. Usually, this should be no longer than one year (unless the parties agree to extend it), and often shorter (sometimes limited to a single meeting). Allowing agreement with no such "window" of time allows a company to transmit confidential information, even years later, when NYU no longer wishes to receive the information and those who receive it may not be aware of the existence of the CDA. Keeping the parameters of disclosure well defined avoids downstream entanglements.
10. Authority to Sign CDA's. Ordinarily, faculty members and researchers are not authorized to sign CDA's on behalf of NYU. CDA's should be reviewed by one of the offices identified in the opening paragraph, and should be signed by an authorized representative of the University. Faculty and administrators may sometimes be required to individually co-sign an agreement, along with NYU, to document they have "read and understood" their obligations under the agreement.
11. Release of Confidential Information. All CDAs must allow for release of confidential information under at least certain circumstances, such as when

required by law, where a regulatory or accrediting agency requests the information from the University in connection with its oversight obligations or where a valid subpoena is issued.

Having these basic issues addressed prior to signing a confidentiality agreement is critical to ensuring the integrity of the University's business relationships and research programs. The Office of General Counsel is available to assist in reviewing these agreements, and has standard agreement clauses and forms to assist in putting appropriate relationships in place to exchange confidential information.

Further Resources

If you have legal questions about confidentiality agreements, you can find a member of the Office of General Counsel who practices in this area by visiting our [practice areas page](#) and scrolling to "Confidentiality Agreements."