

Confidentiality Agreements

Learning Objectives

The objectives of this chapter are:

- To introduce you to the concept of Confidentiality and the importance of it within a business environment.
- To introduce you to Confidentiality Agreements so that you understand what they are and why and when they are used.
- To enable you to identify under what circumstances different types of agreement should be used and any additional clauses that should be included.
- To understand some of the basic terminology that is used within Confidentiality Agreements.

Introduction

This chapter introduces you to Confidentiality Agreements, what they are, when they should be used and what needs to be included within one.

The Law of Confidentiality

Information that is categorised as confidential can only be disclosed or used by a confidant under certain circumstances. Any action for breach of confidence is based on the English Law of Confidentiality¹. The usual purpose of any action taken is to prevent the use or disclosure of Confidential Information in a manner that contradicts the terms under which it was originally provided. For instance, by gaining an injunction against a party who is potentially considering disclosing Confidential Information, or gaining compensation after Confidential Information has been revealed.

¹ This law is not legislated, rather is based upon case law (precedent of earlier court decisions) or common law (principles established in top-level court decisions). [David Dodson]

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Before an action can be commenced for breach of confidence three criteria must be satisfied:

- The information must be confidential.
- The disclosure of the information must have been in circumstances which give rise to an obligation of confidence.
- There must be an actual or anticipated unauthorised use or disclosure of the information².

[1]

In general, Confidentiality has a broader scope than Copyright as Copyright is only concerned with the protection of the form in which the information, idea or thought is expressed whereas Confidentiality regards protection of the content of the information, idea or thought.

What Is A Confidentiality Agreement?

A Confidentiality Agreement is a legal document that binds the signatories (at least two parties) to certain conditions preventing unauthorised disclosure or use of any information defined as Confidential within the document. It can be simply defined as an “agreement restricting the use of information by prohibiting a contracting party from divulging data” [2].

Note: Confidentiality Agreements are also often known as Confidential Disclosure Agreements (CDAs) or Non-Disclosure Agreements (NDAs).

Why Use Confidentiality Agreements?

Signing Confidentiality Agreements allows businesses to approach potential partners, suppliers, consultants and customers with an idea, knowing that they are legally forbidden to pass on that information to anyone.

² Whilst anticipation of unauthorised use can form the basis for an injunction, recompense (damages) cannot be granted in such cases.

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For example, a company may have come up with a product design and needs to get an estimate from a manufacturer of how much it will cost to make. A Confidentiality Agreement can help to ensure that this manufacturer does not pass any part of the design to one of your competitors.

There are two main legal objectives when using Confidentiality Agreements:

- To assist with acquiring an injunction or compensation if the owner suspects that the recipient is about to (or already has) disclosed Confidential Information.
- To assist in patent applications.

These legal objectives are considered in the following sections:

Facilitate Legal Action

Use of legally accurate Confidentiality Agreements helps the disclosing party to fulfil the second of the required criteria for legal action, as per the English Law of Confidentiality, described previously. That is not to say that an “obligation of confidence” cannot arise even in the absence of such an Agreement. But recording the obligation in a written Confidentiality Agreement gives added legal certainty when an action is required for either injunction or compensation purposes.

Patents

To get a patent an invention must be completely novel, in the sense of not having previously been available to the public. If the inventor makes it public at any time before submitting an application then it is clearly no longer novel. Disclosure is unnervingly easy and care should be taken with the contents of all documents (including e-mails and websites) as well as in conversations and discussions with others. If even one person has been told about an invention before a patent application has been filed then this may invalidate any patent granted and leave the inventor with no rights, unless the disclosure was made “in confidence”.

[3, 4]

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Disseminating results is a vital part of academic research, but publishing papers that describe a new technology or process before a patent application is filed will almost certainly destroy the chance of a patent being granted. Despite the perceived delay in publishing, the possibility of commercial exploitation of an invention must be looked at first. Draft publications can act as a very good basis for a patent, so there is not necessarily a large duplication of effort and a patent application can often be prepared without much delay. Once the application is filed, publication can proceed safely.

[4]

When Might A Confidentiality Agreement Be Used?

Generally Confidentiality Agreements are used so that parties can:

- Share intellectual property.
- Share commercial or trading information.
- Formalise a relationship, e.g. between an employer and employee.

Here are some typical situations where a Business owner may wish to use a Confidentiality Agreement:

- Presenting an invention or business idea to a potential partner, investor, distributor or manufacturer.
- Sharing financial, marketing, and other information with a prospective buyer of the business.
- Showing a new product or technology to a prospective buyer or licensee.
- Receiving services from a company or individual who may have access to some sensitive information in providing those services.
- Allowing employees access to confidential and proprietary information of the business in the course of their job.

[5]

As well as using Confidentiality Agreements with clients, suppliers, resellers and advisors, they can also be used with employees, or

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journalists who you want to give a “sneak preview” of financial, technical or new product information.

Minimising the Risk of Confidentiality Breaches

Employee Breaches

Most breaches of confidentiality are due to current or former employees. Employees are under an implied duty to refrain from using trade secrets in a manner that will harm the business, but using a Confidentiality Agreement (or a clause within the employee’s contract) will ensure that the employee knows precisely what is confidential and what is expected of them with regard to any Confidential Information that they may acquire. Equally, the Confidentiality Agreement must make provisions for when the employee leaves the company.

Other Breaches

As stated before, an “obligation of confidence” has to be determined in order to successfully obtain legal action against any party. To make this easier a clause that stipulates a requirement to mark all confidential materials as “CONFIDENTIAL” is often included in agreements. This places a responsibility upon the disclosing party to highlight that specific written articles are confidential. Occasionally, in the case of mutual agreements, people do not like this clause to be included, as they are worried they might be “caught out” by passing on confidential material that isn’t marked. However, it does have the effect of making it easier for the receiving party to manage confidential information and reduces the chances of it being handled inappropriately.

It can also be advisable to physically secure confidential information. In any legal action for breach of confidentiality, the courts would be reluctant to treat information as secret where practical steps to protect the information had not been taken.

Such measures could include:

- Locking confidential information away.
- Limiting the number of people who can access the information.

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- Ensuring up-to-date IT security systems are in place.

Some other “good practice” techniques are:

- Always mark everything with an appropriate designation (including “unclassified”, or similar, if the information is not confidential), ideally on every page in the case of a document or PowerPoint presentation.
- Refer explicitly to any confidentiality agreements on the front page of any document.
- Specifically highlight in conversation, any information which you wish to be kept confidential (even if it is covered by a Confidentiality Agreement).
- After a meeting in which confidential information is exchanged, follow up in writing to highlight the confidential information that was given, and refer to the original Confidentiality Agreement.

Taking the steps described will assist with proving that an obligation of confidence exists, should any unauthorised disclosure take place.

Types of Confidentiality Agreement

Mutual Vs Non-Mutual Agreements

There are two basic formats for Confidentiality Agreements – a mutual agreement, or a one-sided (non-mutual) agreement. Mutual agreements are used when both parties could potentially share confidential information, whereas the non-mutual agreement assumes that only one side will be disclosing confidential information.

Although there is always some appeal to using a mutual form of Confidentiality Agreement, it is usually better to use the non-mutual form if you are not planning to receive Confidential Information from the other side. One way to decide this early on is to let the other side know that you don’t want to receive any of their Confidential Information, so you don’t see the need for a mutual form if they ask for one.

[5]

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Academic Agreements

When academics sign Confidentiality Agreements additional considerations often need to be taken, to allow for the publishing of their work.

The issues that arise generally centre on the classic tension between the University's desire for open, free sharing of information, and the commercial world's desire to maintain trade secrecy of certain information for commercial purposes and to retain a competitive advantage.

The reality, however, is rarely so clear cut. Academics also need to keep certain information secret (e.g. confidentiality of the identity of research subjects, delays to allow patent filing).

Careful management can often overcome these issues, for example, most journals can treat submissions in confidence until the publication date, allowing time to protect important IP with patents. A similar approach can be used for research council funding applications.

At least one study out of the dot-com era also identified the potential for a negative impact on students. In one extreme case at the Massachusetts Institute of Technology (MIT), an undergraduate was unable to complete a homework assignment that was closely related to work he was doing for a company because he had signed a non-disclosure agreement that prohibited him from discussing his work. Interestingly, the company that employed the student was owned by an MIT faculty member, and the instructor of the class owned a competing firm. In the end, the instructor of the course was accused of using his homework as a form of corporate espionage, and the student was given another assignment.

[6]

Agreements with Public Bodies

Confidentiality Agreements made with a public body (for example the NHS) need to be carefully considered because any information that is provided may be disclosed under the terms of the Freedom

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of Information Act 2000 which came fully into force in January 2005. This gives anyone the right of access to information held by public authorities. It is usually a good idea to ask the public body if they have a Confidentiality Agreement that meets the terms of this Act, and assuming it is acceptable use this agreement.

Key Elements of a Confidentiality Agreement

This section details the essential elements of a Confidentiality Agreement. Of course, other clauses can or must supplement these basic elements according to the needs of each situation and the parties' wishes.

Confidentiality Agreements don't have to be long and complicated. In fact, the good ones usually don't run more than a few pages long.

In the agreement, it is a good idea to specify:

- How the information can be used.
- Any restrictions on the use of the information you provide e.g. prevent them from making copies.
- That the owner retains the intellectual property rights, copyright or possible patents.

The key clauses will be those detailing:

- Protection against the copying or retention of confidential information.
- Protection against disclosure of information not already in the public domain.
- A remedy, e.g. compensation, for any breach of the agreement.

Certain terms are likely to crop up in Confidentiality Agreements. It is a good idea to understand these terms and their definitions:

- **Confidentiality:** A legal principle that maintains secrecy between parties.
- **Owner** or **Discloser:** Name of the person, organisation or business disclosing the information.

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- **Recipient:** Name of the person, organisation or business that is receiving the information and that is responsible for ensuring its confidentiality.
- **Statement of Reasons:** A short paragraph defining the context in which the information will be disclosed and why the parties want to make the information the subject of a contract.
- **Subject:** Information and documents that will be the subject of the confidentiality agreement, including the details of how confidential information is identifiable for example, those documents marked Confidential.
- **Penalty Clause:** An optional way of fixing an amount of compensation that the owner or discloser is paid if the recipient breaches the agreement.
- **Confidentiality Clause:** An optional clause that requires both parties to keep the existence of the confidentiality agreement a secret.
- **Term of Agreement:** How long the obligations of the contract last for.

What Information can be Deemed Confidential?

The biggest difficulty when deriving Confidentiality Agreements comes when determining exactly what is and what isn't covered by the agreement. The person disclosing the information wants the contract to be interpreted in its broadest form, whereas the recipient will prefer to see the contract interpreted in a narrow way.

Confidential Information is often in the form of documents disclosed to the receiving party but it should also cover ideas presented in meetings or conversations or via email.

Confidentiality Agreements can cover:

- A description of the invention, software or technical mechanism.

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- Trade secrets³, e.g. a formula, programme or process.
- Technical drawings and designs.
- Algorithms, schema, mathematical and chemical formulae.
- Research results.
- Business plans and strategies.
- Commercial data.
- Unpublished patent applications.
- Negotiations.

In certain cases, information or know-how that will be the subject of a confidentiality obligation is not (or not yet) protected by intellectual property. In such a case, allowing the disclosure of non-patented inventions, know-how, ideas or concepts etc. to third parties would very often invalidate the owner's efforts to obtain such protection.

It is necessary to be able to identify the information or know-how that is the subject of the confidentiality agreement.

At least two hypothetical cases can arise:

- The information is completely related to a precise project (the description of an invention, for example).
- The information will be revealed gradually in an extended collaboration between the parties (during the course of a Research and Development project, for example).

In the case of a medium or long term partnership, or under a Research and Development project, for example, parties cannot always determine beforehand the information and documents which will be revealed.

As discussed earlier, it is advisable to set up a system that enables the clear classification of confidential information (by marking it "CONFIDENTIAL" with a reference to the Confidentiality Agreement)

³ Information qualifies as a trade secret when it is not known in the public domain and is valuable only as long as it remains secret or confidential.

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that will be disclosed later and at various intervals over a period of time, in order to benefit from the protection granted by the agreement.

A clause can also be included to restrict the ways in which documents can be used, for example:

- A ban on making copies.
- Restriction of access to the documents among the recipient's personnel or subcontractors.
- An obligation to return the original and any copies of the document at the end of the collaboration.

Exclusions from Confidentiality Treatment

Typically the restrictions on use of the confidential information will be invalid if:

- The recipient had prior knowledge of the materials.
- The recipient gained subsequent knowledge of the materials from another source.
- The materials are generally available to the public.
- The materials are subject to a subpoena. In any case a subpoena would more likely than not override a contract of any sort.

Other Agreements Incorporating Confidentiality

There are other kinds of documents that can incorporate an obligation to confidentiality.

Examples of these are:

- Software evaluation agreements.
- Material transfer agreements.
- Partnership agreements.
- Memoranda of understanding.
- Teaming agreements.

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Summary

Confidentiality is a very important concept within a business environment, particularly when collaborating with other people or companies. Confidentiality Agreements are used extensively to ensure the protection of ideas. This chapter has defined what a Confidentiality Agreement is, why and when one should be used as well as what should be included.

Tasks

1) *Consider the Following Situation:*

As an owner of a small, independent, hardware development company you have devised a new groundbreaking system that can turn water into wine. You are convinced this system will make you millions, but you have no marketing systems in place for such a product and need to employ a specialist marketing firm to ensure widespread use of the product. Research has shown that there are a number of different marketing firms that could be collaborated with and meetings have been arranged in order to choose the most suitable. What precautions should you take at the first meeting? Note the marketing firm is unlikely to sign a Confidentiality Agreement without knowing a little of the background details for the project. What type of Confidentiality Agreement should you use - are there are additional clauses that are required?

2) *Read the Following Article:*

Forcing Newspaper Reporters to Sign Legal Agreements in Order to do Their Work as Journalists

Microsoft, whose "Sidewalk" online city guide directly competes with newspapers, is successfully forcing newspaper reporters to sign agreements that give Microsoft control over what news is published about Sidewalk.

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Reports from the field indicate that Microsoft is trying to exert control over reporters by having them sign non-disclosure agreements (NDAs), which prohibit a journalist from writing about information given out during Sidewalk pre-launch interviews. To be fair, this is a common ploy among software and technology companies to try and control the timing of independent media coverage of their wares.

Predictably, the Microsoft NDAs are unpopular among reporters, although some who cover the industry sign them anyway -- feeling forced to do) so in order to get information out of the company about technologies or services still under development and stay on top of their beats. Some reporters steadfastly refuse to sign any NDA.

No NDA, No Interviews

The NDA issue popped up recently for Jim Romenesko, a technology writer for the St. Paul (Minnesota) Pioneer Press, who set up a trip to Seattle to interview executives of Sidewalk. He planned to write articles about Sidewalk's launch in the Twin Cities, and expected to have a piece ready to run in the newspaper one or two days prior to the Twin Cities Sidewalk launch. He says he told Microsoft representatives in advance that his plan was to write prior to the actual launch date.

A day before his scheduled flight to Seattle, however, a representative of Sidewalk PR agency Shandwick USA called to say that Romenesko would have to sign an NDA that would prohibit the reporter from publishing any information that Sidewalk executives told him prior to Sidewalk's "embargo" date. Romenesko said he would not sign it, and he offered to do the interviews "off the record," but the pre-arranged interviews were cancelled.

Requires Disclosure of Non-Microsoft Sources

What Romenesko objected to most about the NDA presented by Microsoft was a clause that said that he could report on information learned during an official Microsoft interview only if he got the same

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information from another independent source -- but he would have to prove to Microsoft that he got the information from a non-Microsoft source, or presumably be liable for breaching the terms of the NDA if the information was published before the official Microsoft launch.

Microsoft, says Romenesko, is actively discouraging independent reporting by journalists, preferring to orchestrate press coverage. "I see it as another part of their strategy to control reporters," he says.

Microsoft Response

Gayle Troberman, Microsoft's consumer marketing manager who handles public relations for Sidewalk, says that the company policy is to try to give all reporters an equal shot at covering a particular Microsoft development. Romenesko wanted to get an advance look at Twin Cities Sidewalk, while the Sidewalk staff "wanted to give everyone the story at the same time," Troberman says. The issue is being fair to all reporters and not favouring any particular journalists, she says.

Microsoft corporate PR executive Greg Shaw defends the use of NDAs for journalists, saying it is common throughout the software and other industries -- and allows reporters to learn about upcoming technological trends and stay on top of their areas of coverage, and protects Microsoft's need to keep confidential information out of the press in a competitive atmosphere. He says Microsoft, in general, requires NDAs of reporters on an ad hoc basis, with a new piece of technology likely to require one while an upgrade to existing product not.

Reporters' Scourge?

Shaw gives the impression that NDAs are a non-issue, but an informal poll of business reporters and editors found a combination of disdain for and resignation about NDAs. "It's a scourge on the industry," commented one technology reporter for a large U.S. daily who periodically covers Microsoft; she says she refuses to sign them. Rather, she is willing to agree verbally to an embargo on

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information. But companies like Microsoft sometimes insist on a signed piece of paper.

Particularly troubling to some reporters is the idea of signing an NDA that restricts when they can publish information, then seeing a competitor scoop them on the same story. Having signed an NDA, they are forced to hold their information even after it's been published elsewhere.

Pimm Fox, former business editor of the San Francisco Chronicle and business magazine editor, says he told his reporters they could do what they wanted, but he strongly encouraged them to refuse to sign NDAs. "I think they're terrible... They're a major contributing factor to the ruining of (business) journalism," he says.

Fox says a reporter should refuse to sign an NDA and "write the Story anyway. ... That may mean you don't get the official quote from the senior vice president -- but, so what?"

By Steve Outing

Outing writes the Stop the Presses! column for the MediaINFO.com Web site.

[7]

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Appendix 1: Example Mutual Confidentiality Agreement

CONFIDENTIAL DISCLOSURE AGREEMENT

This agreement is made the _____ day of _____ 2006 between the University of York of Heslington, York, YO10 5DD, UK and

WHEREAS

- A. The parties hereto wish to hold discussions concerning [_____] ("the Field") and may wish to disclose to one another confidential technical and business information relating to or relevant within the Field ("the Confidential Information").
- B. The parties wish to ensure that the Confidential Information remains confidential

NOW THEREFORE the parties agree to the following:

1. The extent of the Confidential Information to be disclosed will at all times be at the discretion of the disclosing party, ("the Disclosing Party")
2. Each party receiving information ("the Receiving Party") will treat the Confidential Information disclosed to it by the other party as secret and confidential and will not except with the prior written consent of the Disclosing Party, make use of the same except for the purpose of the evaluation thereof, nor disclose the same to any third party except, and then only to the extent necessary to evaluate the same, to such of its employees and employees of its affiliates as shall have been made fully aware that the same is secret and confidential and are bound to treat it as such.
3. Confidential Information provided by either party in documented form to be clearly marked with the words Confidential Information.
4. The restrictions as to use and disclosure set out above shall not apply to Information which:
 - a) is at the date of disclosure in the public domain or which subsequently enters the public domain other than by breach of the terms of this Agreement by the Receiving Party ;
 - b) is at the time of disclosure already known to the Receiving Party other than from the Disclosing Party;
 - c) becomes known to the Receiving Party from third parties having lawful title to the same ;
 - d) is approved for release from the provisions of this Agreement by written authorisation from the Disclosing Party;
 - e) is independently developed by an employee of the Receiving Party who has not had access to any of the Confidential Information disclosed by the Disclosing Party;
 - f) is required to be disclosed by applicable law or order of a court of competent jurisdiction or government department or agency, provided that prior to such disclosure the Receiving Party shall advise the Disclosing Party of the proposed form of disclosure.
5. The Receiving Party will at the written request of the Disclosing Party return the Information together with any copies or extracts thereof which have been made.
6. No licence is granted to the Receiving Party hereunder, and no licence shall be deemed to

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have arisen or implied.

7. The Confidential Information, including any documents, drawings, sketches, designs, materials or samples supplied hereunder, will remain the property of the party disclosing the same and no rights are granted to the Receiving Party in the same, whether patented or not except the limited right to use set out above with respect to the said Field.
8. The Receiving Party will use its best endeavours to ensure that the Information is treated as restricted information within the Receiving Party and that the Information will not be disclosed to any third party not directly concerned with the evaluation of the Information. The Receiving Party will take all reasonable steps to ensure that persons to whom the Information is disclosed will at all times keep the same secret and confidential and will not use the same other than for the purpose of furthering their discussions.
9. The parties do not intend that any agency or partnership be created between them by this Agreement.
10. All additions or modification to this Agreement must be made in writing and must be executed by both parties.
11. This Agreement shall be construed in accordance with and governed in all respects by the laws of England.
12. This Agreement shall terminate five years from the date first written above.

SIGNED FOR AND ON BEHALF OF THE UNIVERSITY OF YORK

.....
Name: Sue Final Title: Intellectual Property Manager

SIGNED FOR AND ON BEHALF OF LIMITED

.....
Name: Title

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Appendix 2: Example Non-Mutual Confidentiality Agreement

CONFIDENTIAL DISCLOSURE AGREEMENT

This agreement is made _____ 2006 between the University of York of Heslington, York, YO10 5DD, UK (hereinafter referred to as "the University") and _____ of _____ (hereinafter referred to as "the Recipient").

WHEREAS

- A. The University has expertise, know-how and technology in the laboratory of *[Professor]* in its Department of [_____] relating to *[Subject]*
- B. The Recipient has expressed interest in receiving information concerning the work of the Department (the "Information") in order to evaluate the expertise with a view to undertaking collaborative research, discussing technology transfer or commissioning work from the University.

NOW THEREFORE the parties agree to the following:

1. The University shall disclose Information to the Recipient in writing orally or by demonstration as is practical and in sufficient detail to enable the Recipient to fully evaluate the same.
2. In consideration of the disclosure of Information by the University the Recipient agrees at all times until such time as the Information becomes part of the public domain through no fault of the Recipient that it will treat the Information with all reasonable and practicable care to avoid disclosure of the same to any other person firm or organisation and the Recipient shall be liable for unauthorised disclosure or failure to exercise reasonable and practicable care with respect to the Information. The Recipient shall have no obligation with respect to the Information or any part thereof which
 - (a) is at the date of disclosure in the public domain or which subsequently enters the public domain other than by breach of the terms of this Agreement by the Recipient;
 - (b) is at the time of disclosure already known to the Recipient other than from the University;
 - (c) becomes known to the Recipient from third parties having lawful title to the same ;
 - (d) is approved for release from the provisions of this Agreement by written authorisation from the University;
 - (e) is required to be disclosed by applicable law or order of a court of competent jurisdiction or government department or agency, provided that prior to such disclosure the Recipient shall advise the University of the proposed form of disclosure.
3. The Recipient will at the written request of the University return the Information together with any copies or extracts thereof which have been made, save that the Recipient may retain one copy of the Information for the purpose of ascertaining its obligations of confidentiality towards the University under this Agreement..
4. The Recipient shall be entitled to subject the Information to such tests analyses or experiments as are warranted in its judgement or of interest to it and to disclose the Information in confidence to its employees and through a signed non-disclosure agreement to any consultant or agent not an employee of the Recipient for evaluation purposes only.

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5. The Recipient will use its best endeavours to ensure that the Information is treated as restricted information within the Recipient and that the Information will not be disclosed to any third party not directly concerned with the evaluation of the Department and its expertise. The Recipient will take all reasonable steps to ensure that persons to whom the Information is disclosed will at all times keep the same secret and confidential and will not use the same other than for the purpose of evaluating the Department and its expertise.
6. This Agreement confers no rights on the Recipient to use the Information other than for the evaluation purposes stated herein such evaluation to be completed within ..(60).. days of the date hereof.
7. Without the prior written consent of the other neither Party shall disclose to any third party either the fact that the disclosures and discussions contemplated herein are taking place or have taken place or any of the terms, conditions or the status thereof at any time or other facts in respect of a possible transaction between the Parties.
8. Notwithstanding anything hereinabove to the contrary, neither Party shall be obliged to enter into any further agreement relating to the Information, or otherwise.
9. Neither Party shall assign or transfer any of its rights or obligations arising under this Agreement to a third party without the prior written consent of the other Party.
10. This Agreement shall be governed by and construed in accordance with the laws of England.

SIGNED FOR AND ON BEHALF OF THE UNIVERSITY OF YORK

..... Date:.....
Authorised Signatory

IN THE PRESENCE OF
.....

SIGNED FOR AND ON BEHALF OF

..... Date:

Authorised Signatory
IN THE PRESENCE OF
.....