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# Overview of Confidentiality Agreements

Confidentiality agreements, also referred to as non-disclosure agreements, are used when the owner of confidential information wishes to disclose that information to another party, usually in the course of business negotiations, and wishes to protect this information. By signing a confidentiality agreement, the recipient undertakes the obligation not to disclose the confidential information as defined in the agreement. While the terms of a confidentiality agreement can typically be detailed in three to four pages, a confidentiality agreement could be 15 or more pages when it covers, for example, jointly developed, patentable technology.

This summary discusses in more detail the basic terms of the Information File C5-81, [Sample One-Sided Confidentiality Agreement](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), and the legal rights and obligations created under the agreements, as well as provisions that could be adapted to specific circumstances and arrangements. The terms detailed below, however, should be considered as basic requirements for any confidentiality agreement. With the key terms detailed in a written agreement, the parties will have reasonable expectations about services to be performed under the agreement and the consequences if those expectations are not met.

This summary does not constitute legal advice. Parties negotiating and contemplating entering into a confidentiality agreement should consult with competent legal advisors.

## Duties and Obligations Created

Following is a discussion of the more important issues to be considered when negotiating and drafting a confidentiality agreement.

**Definition of Confidential Information.** The parties must define "confidential." The party disclosing the confidential information most likely would want the definition to be very inclusive and the recipient

would like the definition to be very narrow. The definition provided in Information File C5-81, [Sample One-Sided Confidentiality Agreement](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), is fairly inclusive and illustrates the breadth of items that can be defined as confidential.

**Obligation of Confidentiality.** The agreement must detail how the confidential information will be handled by the recipient. The recipient's failure to treat the confidential information in compliance with these requirements will result in a breach. Typical requirements include not disclosing the object and scope of the discussions between the parties, not using the confidential information other than for the specified purpose agreed to by the parties, and not disclosing the confidential information to persons or entities other than the employees or agents of the recipient without the prior written consent of the disclosing party. If employees or agents of the recipient are provided access to the confidential information, the disclosing party should expressly require that the recipient require those persons to be bound by the same obligation of confidentiality, and yet remain responsible for the acts of those recipients.

## Exceptions to Obligation of Confidentiality.

Confidentiality agreements typically exclude certain information from the definition of confidential information. Some common exceptions include information that is or becomes public through no act of the recipient, information that was already in the possession of the recipient as of the date of disclosure, and information that is disclosed by court order. Prior to the recipient disclosing confidential information pursuant to court order, the confidentiality agreement should specify that the recipient is obligated to notify the disclosing party of the court's request and detail the disclosing party's rights to intervene to protect the release of its confidential information.

**Ownership of Confidential Information.** The disclosing party should also require the recipient to acknowledge that the confidential information is the property of the disclosing party and that the disclosure of the information does not convey any right, title, or license in the information to the recipient. This is necessary to prevent ambiguity as to what rights, if any, the recipient has in the confidential information. Typically, the transfer of rights would not be the subject of a confidentiality agreement, but rather a development or joint venture agreement should the parties determine to work together using the confidential information. Even then, however, it may not be in the best interest of the owner of the confidential information to transfer any portion of its ownership rights in the confidential information.

**Term.** The confidentiality agreement must also specify the time period during which confidential information will be disclosed and the time period during which the confidentiality of the information is to be maintained. These periods may or may not be the same, and they need not be specified by exact dates (years, months, weeks, etc.). For example, the [Sample One-Sided Confidentiality Agreement form](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), and [Sample Mutual Confidentiality Agreement form](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf), provide that disclosure will occur for so long as the parties are discussing a possible business relationship, but the obligation of confidentiality survives until an exception to the obligation of maintaining confidentiality arises. Other agreements may quantify the time periods and, for example, provide that the disclosure period is for one year and the obligation to maintain the confidentiality of the information is for a two-year period thereafter. If the disclosure period is quantified, the disclosing party should require that the agreement provide for termination by either party at any time prior to the end of the term, subject to reasonable notice as negotiated by the parties. This allows the disclosing party to terminate its obligation to disclose confidential information if it does not wish to proceed with working with the recipient.

**Miscellaneous Provisions.** After spending considerable time negotiating and defining what constitutes confidential information and the obligations to keep the information confidential, it is often easy for parties to neglect the miscellaneous provisions that one typically finds at the end of the agreement. The parties should always pay careful attention to what law will govern the agreement, how disputes will be resolved, and the assignability of the rights and obligations under the agreement.

### Consequences of Breaching a Confidentiality Agreement

When a confidant breaches his or her obligations under a confidentiality agreement, he or she is subject to remedies available to the disclosing party. These remedies may include equitable relief and monetary damages. An injunction against the breaching confidant helps prevent any further breach of the agreement. The court may also award monetary damages if damages can be quantified.

It is often difficult and expensive to enforce a confidentiality agreement even though the agreement, on its face, is detailed as to what is confidential information and what constitutes a breach of the obligation of confidentiality. This is so because of the proof necessary to demonstrate a breach by the other party. Also, while an injunction prohibits future dissemination of the confidential information, it is difficult to contain the information once it has been disclosed and it is difficult to quantify monetary damages. Because of the enforcement issues, the sound advice is to not enter into a confidentiality agreement or share confidential information with a party you do not trust to keep the information confidential.

[Sample One-Sided Confidentiality Agreement form](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-81.pdf)  
[Sample Mutual Confidentiality Agreement form](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf), [www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf](http://www.extension.iastate.edu/agdm/wholefarm/pdf/c5-82.pdf)

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