



Protecting Confidential Information and Trade Secrets

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Does your company have confidential information? How about trade secrets? The concept of owning and protecting confidential information or trade secrets may not have occurred to most contractors. Yet, if you have a client list, pricing formula, particular device or pattern of installation, you have intellectual property worth protecting. This information is no less important to your business than your star employee or your brand name, and it deserves the same diligent protection.

A trade secret is information used in a business that is secret and gives a competitive advantage. It may be a formula, pattern or device, a compound, a manufacturing process, a pattern for a machine or a customer list.

Trade secrets and confidential information are forms of intellectual property, distinct from patents, copyrights and trademarks. Trade secret law is the oldest form of intellectual property protection. If your company develops useful commercial information, and you take reasonable steps to keep it secret, the law affords you a tort remedy to exclude use by others who misappropriate the information. Your rights continue as long as you maintain the secrecy.

What should you be doing to protect your information? Start with identifying what information is confidential or a trade secret. Next have a written policy for how your company and its employees manage and protect it. The policy should include:

1. a definition of what is confidential and a trade secret;
2. a designation of responsible employees for administering the policy;
3. each document should be appropriately labeled, including emails;
4. limitations on circulation and copying;

5. criteria for numbering copies;
6. sign in/out sheet;
7. secure computer storage;
8. secure storage facility and accountability, limitation of access, appropriate signage;
9. confidentiality agreements signed by vendors, consultants and others given access;
10. employee confidentiality agreements and training, certificates of compliance; and
11. exit interviews.

Enforcement actions to recover leaked or stolen information are predicated on the owner having taken "reasonable" steps to protect the intellectual property. This area of law is governed by state law precedents. Enforcement is required when misappropriation occurs due to physical or electronic theft, employee misuse or breach of confidentiality. You will need to prove the competitor acquired the information by improper means, with knowledge it was confidential and without your consent. Defenses often raised are that the information is in the public domain, the party had no reason to know it was secret or confidential, or you failed to take reasonable steps to protect it.

Remedies available to you include temporary and permanent injunctions against further use, damages and an accounting of profits, and attorney fees.

Even if your company does not presently have trade secrets or confidential information, a present or future contract may require that your company safeguard such information provided to you by an owner or another party as part of your contract. Your contract may specify that you are to use the information only in performance of the contract and then return it, using identified safeguards or those your company already has in place for its own trade secrets. These same policies and procedures will afford you a safe haven from claims of negligence or misappropriation during the time you legally have use of another's trade secrets.

If you think you have confidential or trade secret information, you probably do.

For more information about this topic, please contact Stephen G. Test at or 757.473.5324 or any member of the Williams Mullen Construction Team.

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