DIVING INTO THE LEGAL ABYSS: UNDERSTANDING CONFIDENTIAL INFORMATION

Dr. N. Vani Shree, Principal, JSS Law College (Autonomous), Mysuru – 570023. Karnataka, INDIA

Ms. Rajeswari H, BBA.LL. B (Hons.), JSS Law College (Autonomous), Mysuru – 570023, Karnataka, INDIA

" In almost every profession - whether it's law or journalism, finance or medicine or academia or running a small business - people rely on confidential communications to do their jobs. We count on the space of trust that confidentiality provides. When someone breaches that trust, we are all worse off for it."

- Hillary Clinton

ABSTRACT

Confidential information represents a crucial asset. This category of information, which is not intended for public dissemination, is classified as confidential. It encompasses various elements such as facts, figures, data, knowledge, or intelligence that may possess commercial value or not, yet are undeniably significant, with any unauthorised access or use constituting a breach of confidence. Unlike other forms of intellectual property, confidential information is characterised by its specificity. The proprietor of such information must exercise vigilance and be prepared to protect it rigorously. Typically, this protection is achieved through non-disclosure agreements or confidentiality contracts, which can be enforced through civil or criminal legal actions. This document delves into the complexities of confidential information, highlighting its distinction from other intellectual property rights and its inherent connection to trade secrets. Additionally, it examines the application of these principles in India and other jurisdictions, along with the available protective measures. The rights associated with undisclosed information are classified as civil rights. Confidential information does not fall under copyright law or patent protection, necessitating a distinct legal framework for its safeguarding.

Keywords: Confidential Information, Intellectual Property Rights, Civil rights, Confidence and Secrecy.

INTRODUCTION

Information constitutes a significant asset and can be categorised into publicly accessible data and confidential data, which is shared between individuals under conditions of trust. This type of information is referred to as confidential information. It can be elaborated as facts, figures, data, knowledge or intelligence which may or may not have commercial worth but definitely is of value and any infringement can be termed as breach of confidence. It differs from other types of intellectual property because of its specificity. It is information which has the necessary quality of confidence and specificity, originality and uniqueness and lesser public access. Only fair use of information of such nature is permissible and any unfair use is punishable under law. The owner of confidential information must be careful, cautious, and must be prepared to safeguard the information at all costs. It is usually safeguarded by non disclosure contracts or confidentiality agreements which may be protected by civil or criminal remedies. This paper explores the nuances of confidential information, examining how it distinguishes itself from other forms of intellectual property rights and its intrinsic relationship with trade secrets. It further investigates its application in India and various other states, as well as the mechanisms for its protection. Confidential information works according to the principle of good faith, conscience and reason. It is an intangible right mostly it is through oral communication and may not take a material or permanent form. The right in undisclosed information is a civil right. Confidential information cannot be protected under copyrights law or it is patentable, hence there needs a special legal source to protect it.

INCEPTION OF THE CONCEPT OF CONFIDENTIAL INFORMATION

Confidential information revolves around the concept of law of breach of confidence. Contract law was given the bedrock protection to breach of confidence,In the matter of Prince Albert v Strange, the petitioner was Prince Albert, the consort of Queen Victoria, the reigning monarch. The royal couple engaged in the practices of drawing and etching, and a selection of their artworks was submitted to a printer for reproduction. However, the printer exceeded the authorised number of copies and proceeded to sell the additional prints. In this case the house of lords commented, clearly the action on Strange was not an action based on any contract, for privacy. Here, Lord Cottenham pointed out that the action was equally sustainable on grounds of equity, confidence and (presumably as against the printer only)contract law[1]. It should be

[1] (1849) 2 De G & SM 652, aff'd (1849) 41 ER 1171

noted that there have been attempts subsequently to use contract as the basis of breach of confidence actions[2], and clearly confidentiality will often arise, whether expressly or impliedly, as a term of a contract[3]. Although breach of confidence was not existing, breach of faith was actionable per se and was independent upon existence of a contract.

The modern law as to the breach of confidence began with the idea of protecting industrial property. Industrialists thought that their processes had to be kept secret rather than to obtain a patent. The first important case as to the law of breach of confidence is Saltman Engineering Co Ltd V Campbell Engineering Co Ltd[4]. Lord Greene MR described the characteristics of Confidential Information,"*The information, to be confidential, must, I apprehend, apart from contract, have the necessary quality of confidence about it, namely, it must not be something which is public property and public knowledge. On the other hand, it is perfectly possible to have a confidential document, be it a formula, a plan, a sketch, or something of that kind, which is the result of work done by the maker upon materials which may be available for the use of anybody; but what makes it confidential is the fact that maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."*Lord Greene penned the guiding rules for determining an information as confidential information followed by Justice Megarry laid down the three important elements. Megarry J in *Coco v AN Clark (Engineers) Ltd*[5], Stated that doctrine of confidence requires three elements as follows:

1. The information must have the necessary quality of confidence about it (using Lord Greene's definition in *Saltman*)

2. the information must have been imparted in circumstances importing an obligation of confidence;

3. there must be an unauthorised use of that information to the detriment of the party communicating it.

Law relating to breach of confidence evolved through cases and precedents. Doctrine of confidence creates an equitable obligation and the contractual obligation need not be expressed

[2] Vokes V Heather (1945) 62 RPC 135
[3] Holyoak & Torremans, Intellectual Property Law, Oxford University Press, 4th ed…, page no 490
[4] (1963) 3 All ER 413 also reported in (1948)65 RPC 203.
[5] *(1969) RPC 41*

or implied and it was reiterated by Ungoed-Thomas J in Duchess of Argyll V Duke of Argyll[6] Law of confidence is a flexible concept developed by courts, freed from the straightjacket of statutory interpretation[7].

WHAT IS SECRECY…

Trade Secret Vs Confidential Information.

Secrecy is a concept existing within the human community from the inception of our species. It is understood that the human race has tried to keep a lot of information about themselves hidden. Subsequently, we humans concealed certain trade facts, industrial information, and some special knowledge for commercial profits. Especially after the industrial revolution trade secrets began to have great significance, secrets evolved to be of such nature where if let known to the public it would cause huge commercial loss and damage to the industrialists and businessmen.

Confidential information also known as secret information in trade could be anything. It could be the recipe of the product that they are manufacturing or the procedure for manufacturing, packing, marketing etc… It also spread to the mode of managing and doing business. According to the World Intellectual Property Organisation (WIPO) Trade secrets are a type of confidential information which if disclosed is a breach to the honest trade practices. WIPO Suggests trade secrets include a variety of information, both technical and commercial in nature. Technical information may involve details related to manufacturing processes, pharmaceutical testing data, and the designs and schematics of software programs. On the other hand, commercial information can pertain to distribution techniques, lists of suppliers and customers, as well as marketing strategies. Additionally, a trade secret can consist of a unique combination of elements that, while individually available to the public, when combined and kept confidential, offer a competitive edge.

Further examples of information that can be safeguarded as trade secrets include financial data, proprietary formulas and recipes, as well as source code[8].

[6] (1967) Ch 303 at 322
[7] David Bainbridge, " Intellectual Property" 2002, Pearson Education Ltd. 5th edn… , pg. No: 276.
[8] Available at https://www.wipo.int/en/web/trade-secrets

At this stage it can be quoted that all trade secrets are confidential information but all confidential information are not trade secrets. A consolidative definition for confidential information shall be *"any form or type of financial, business, scientific, technical, economic or engineering information, including the whole or any portion or phase of any process, procedure, formula, improvement, pattern, plan, design, prototype, code, compilation, program, method, technique, or listing of names, addresses or telephone numbers, whether tangible or intangible, stored, compiled, or memorialised physically, electronically, graphically, photographically, or in writing."* [9]

Know-Hows

Know-Hows are a form of information. This is a type of Intellectual property very similar to Trade Secrets and comes under the umbrella concept of Confidential Information. It is usually known to a person by means of their experience in a particular work. The expertise derived from a patented invention differs from that which is intended to remain confidential. Nonetheless, these two forms of knowledge typically complement each other. While know-how itself cannot be patented, legal protections are still afforded to it if it possesses actual or potential commercial value. "Know-how" is different from other kinds of knowledge such as prepositional knowledge in that it can be directly applied to perform a task. In intellectual property law, the "know-how" is a parcel of closely-held information relating to industrial technology, sometimes also referred to as trade secret which enables its user to derive commercial benefit from it. "Know-how" as an intellectual property, would mean a proprietary series of practical, non-patented knowledge, derived from the owner's experience and tests, which is secret, substantial, and identified. It is secret because it is not generally known or easily accessible. Since know-how would include knowledge indispensable to the licensee for its use, or for sale, resale, management or organisation of the contractual goods or services, it is substantial. "Know-how" must be described in a sufficiently comprehensive manner in order to verify whether it meets the secrecy and substantiality criteria[10]. An agreement concerning the transfer of "know-how" as a form of intellectual property may also include the exchange of non-proprietary information. The term "know-how," in its general sense, does not automatically

[9] WTO, Draft Law on Confidential Information, Available at https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.wto.org/english/thewto_e/acc_e/cgr_e/wtacccgr24a2_leg_11.pdf&ved=2ahUKEwiuxrKY5vGJAxXkxjgGHSM6BPIQFnoECB0QAQ&usg=AOvVaw1NMzQwaRtQQHGW2CgDihmv

[10] Indian Farmers Fertilizer ... vs Commissioner Of Central Excise on 26 December, 2006,(2007)7VST6(CESTAT-NEW DELHI)

categorise all processes involved in performing a task as intellectual property. This classification applies only to confidential know-how or trade secrets that are exclusive to the holder and not publicly accessible. Consequently, the commercial utilisation of such know-how can only occur under a licence granted by the individual possessing the know-how, which represents a unique skill that is not known to others and can be shared for commercial purposes.

Other Confidential Information

Apart from trade secrets, confidential information could be anything which should not be disclosed or leaked. It can be either a personal data or be an official secret of a country.

Personal data shared on the basis of a fiduciary relationship.

- Employer and Employee

  An employer may possess a wide range of personal information about an employee for various employment-related purposes. This information can include, but is not limited to, bank details, social security numbers, medical records, performance evaluations, and contact information. Given the sensitive nature of this information, it is crucial that it remains confidential and is handled with the utmost care. Employers have a legal and ethical obligation to protect this data from unauthorised access, disclosure, or misuse.

- Medical profession

  Medical professionals hold critical and sensitive information about an individual's health status, which encompasses a wide range of details including medical history, diagnoses, treatment plans, medications, and any other relevant health-related data. Due to the sensitive nature of this information, it is classified as confidential. This confidentiality is a fundamental principle of medical ethics.

- Legal Profession

  The relationship between a client and an advocate is characterised as a fiduciary relationship, wherein the advocate possesses access to sensitive and critical information

regarding the client. Consequently, it is essential that this information remains confidential and protected from disclosure to third parties.

Official secrets

Official Secrets of a country shall include any such defence related information, any scientific knowledge or information worth national security which has to be concealed and shielded.

Official secrets are governed under the Official Secrets Act,1923[11]. This Act is meant to keep secrets and maintain confidentiality in certain national affairs, usually between the country's highest officials. The Official Secrets Act of 1923 was enacted to safeguard the privacy and confidentiality of government matters, primarily in the interest of national security. This law applies to high-ranking government officials tasked with managing sensitive information, as well as to those contracted or employed by these officials in government service.

LEGAL FRAMEWORK OF CONFIDENTIAL INFORMATION

The legal framework surrounding confidential information is a complex and multifaceted area of law that lacks a singular, well-defined structure. Unlike more established legal concepts, the protection of confidential information is derived from a diverse array of legal sources, each contributing to the overall landscape of confidentiality and its enforcement.

One of the primary sources of protection for confidential information is contract law. Parties often enter into confidentiality agreements or non-disclosure agreements (NDAs) to explicitly outline the terms under which sensitive information can be shared and the obligations of the parties involved. These contracts serve as a legal safeguard, providing a clear framework for what constitutes confidential information and the consequences of unauthorised disclosure. Breaches of these agreements can lead to legal action, where the injured party may seek damages or specific performance to enforce the terms of the contract. In addition to contract law, information technology regulations play a significant role in the protection of confidential information, particularly in the digital age. Section 72 of Information Technology Act, 2000 provides punishment to anyone who breaches confidentiality and privacy. This law Penalises anybody who acts in contravention to law of confidence

[11] Act No XIX of 1923

S.72 reads as:

"*Save as provided in this Act or any other law for the time being in force if any person who, in pursuance of any of the powers conferred under this Act, rules or regulations made thereunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to other person shall be liable to penalty which may extend to five lakh rupees."*

Criminal law also intersects with the protection of confidential information, particularly in cases involving theft, espionage, or unauthorised access to sensitive data. Certain statutes criminalise the unauthorised disclosure of confidential information, thereby providing an additional layer of protection. For instance, laws against industrial espionage can impose severe penalties on individuals or entities that unlawfully acquire trade secrets or proprietary information. When breaches of confidentiality occur, remedies are typically pursued through common law. This body of law allows individuals and organisations to seek redress for damages resulting from unauthorised disclosures or misuse of confidential information. Common law remedies may include compensatory damages, which aim to restore the injured party to the position they would have been in had the breach not occurred, as well as injunctive relief, which can prevent further disclosures or require the return of confidential information. The Right to Information Act,2005 (RTI) serves as a crucial legislative framework that promotes transparency and accountability in governance. However, it also recognizes the need to protect sensitive information that could harm the interests of individuals or organisations if disclosed. One of the key provisions in this regard is Section 8(d) of the Act, which explicitly safeguards trade secrets and confidential information from public disclosure. This exception is vital for maintaining the integrity of businesses and encouraging innovation, as it ensures that proprietary information, which could provide a competitive edge, remains protected from unauthorised access or dissemination. In addition to the protections offered by the RTI Act, the Department of Science and Technology has taken further steps to bolster the safeguarding of confidential information through the proposed Draft National Innovation Act, 2008. This draft legislation aims to create a comprehensive framework for fostering innovation in the country while simultaneously ensuring that sensitive information related to research, development, and commercial activities is adequately protected. By addressing the nuances of intellectual property and confidentiality, the Draft National Innovation Act seeks to encourage

collaboration and investment in innovative projects without the fear of compromising valuable trade secrets.

In summary, the legal framework surrounding confidential information is not a singularly defined concept but rather a patchwork of protections derived from contract law, information technology regulations, and criminal law. Each of these sources contributes to the overall ability to safeguard sensitive information, while common law provides the mechanisms for seeking remedies in the event of a breach. As technology continues to evolve and the importance of data protection grows.

REMEDIES AVAILABLE FOR BREACH OF CONFIDENCE

Remedies for a breach of confidence are legal solutions available to individuals or entities whose confidential information has been improperly disclosed or used without authorization. These remedies aim to address the harm caused by the breach and to deter future violations. The primary remedies include:

1. Injunctions: An injunction is a court order that requires a party to do or refrain from doing specific acts. In the context of a breach of confidence, an injunction can be sought to prevent the further disclosure or use of the confidential information. This remedy is particularly important in cases where the harm from the breach is ongoing or where the information is still in the possession of the party who breached the confidence. An injunction can be temporary (preliminary) or permanent, depending on the circumstances of the case.

2. Accounts of Profits: A profit account is a remedy that requires the party who breached the confidence to account for any profits made as a result of the unauthorised use of the confidential information. This remedy is designed to prevent unjust enrichment, ensuring that the breaching party does not benefit financially from their wrongful actions. The court may order the breaching party to pay the original holder of the confidential information a sum equivalent to the profits earned from the breach.

3. Damages: Damages refer to monetary compensation awarded to the injured party for the losses suffered due to the breach of confidence. This can include direct losses, such as lost profits or business opportunities, as well as consequential damages that arise from the breach. The amount of damages awarded will depend on the specific circumstances of the case,

including the extent of the breach, the nature of the confidential information, and the impact on the injured party.

In addition to these primary remedies, courts may also consider other factors, such as the conduct of the parties involved, the nature of the confidential information, and the potential for future harm. Ultimately, the goal of these remedies is to restore the injured party to the position they would have been in had the breach not occurred, while also promoting respect for confidentiality and trust in business and personal relationships.

CONCLUSION

Hence it is understood that Confidential Information is an unique type of Intellectual Property Rights it cannot be protected under copyrights and patentable. This concept revolves around the law of equity, good conscience, responsibility and trust. This is a tangible right and not necessarily written or documented. This is a blanket concept which is not limited to IP Laws. The basis of this law is from the TRIPS Agreement and various other nations have made separate laws in this regard. India governs it on the basis of Non Disclosure Agreement in contracts and penal provisions in Information Technology Act. Confidential Information is just information and its quality confidentiality is what makes it unique. The primary need for protection of confidential information or Trade secrets is its commercial value and the risk of causing havoc if exploited.