

need to know

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Confidential Information and Confidentiality

There are many situations during the development of a game that may see a need for otherwise confidential information to be shared with someone who may be interested in the development of your game. If those involved in such discussions are not already under existing contractual confidentiality obligations (which will be documented in any specific contract under which they are working), there ought to be a separate confidentiality agreement in place.

It is possible to protect sensitive business information through what is known as “rights in confidential information” (which covers know-how and trade secrets). Whilst such rights are not strictly intellectual property rights, they can protect both commercial and technical sensitive information and, under English law, do not need to be registered. To be enforceable, the information to be disclosed must satisfy three tests:

1. It must be confidential in nature i.e. it must not be public property or public knowledge.
2. It must have been given under circumstances which give rise to an obligation of confidence – for example through the way the information has been given (e.g. being informed of its confidentiality ahead of it being disclosed), or as a result of an existing relationship e.g. employer/employee, or (as discussed below) following entry into a specific confidentiality contract.
3. Its unauthorised use would be against the interests of the person parting with it.

As referred to at the end of point 2 above, the clearest method of ensuring that all parties to an exchange of information are aware that the information is understood and agreed to be confidential is to sign a confidentiality agreement (also known as a non-disclosure agreement or NDA) before any information is given out – this will satisfy the second bullet point above.

It is possible that you may have been in discussions with someone already but without an NDA being in place. Whilst that is definitely a risk, the lack of something in writing is not necessarily fatal to your position - it may be that you have had prior discussions confirming the confidential nature of what is to be discussed and given each other assurances of confidentiality. Whilst verbal agreements are enforceable, proving what was agreed at a later date is the problem.

Even if discussions about confidentiality are not had at the beginning of a discussion (after all, discussions about projects can take place in all sorts of places, not necessarily always in a formal business setting), confidentiality can be enforced against the recipient of information even where that person had no knowledge of its confidential nature when the information was received if they later become aware of its confidentiality. As confirmed in a 2013 court case, an action for breach of confidence is based ultimately on conscience, with the judge saying for the "conscience of the recipient to be affected, it must have agreed, or must know, that the information is confidential".

Therefore, if you have discussed confidential information but it's been discussed as if it were common knowledge, it would be reasonable for the recipient to assume that they are under no obligation to keep it confidential. If no express requirement of confidentiality is imposed (whether verbal or written), there is room for doubt as to whether or not the recipient is under any confidentiality obligations. In

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such circumstances, you would have to act quickly to confirm to the recipient the confidential nature of the information before the recipient has acted in a way that is to your detriment and which, ultimately, may jeopardise some part of or an entire project.

Therefore, for certainty and to avoid potentially costly or project-ending misunderstandings about what is and what is not confidential information, it is best to get a written agreement in place before discussions start. If discussions have started but not under a specific NDA, it is possible to subsequently enter such an agreement and refer in it to information shared prior to the date of the agreement – but, remember, such a clause will be too late if the recipient has already shared your secrets with a third party. An NDA does not guarantee the protection of your confidential information but it does set out what is to be regarded as confidential, it puts the parties on notice of the expectation of confidentiality and having a written agreement also makes an action for breach of confidentiality easier to enforce if needs be.

Depending on the bargaining power of those involved in the discussions, there may be differing attitudes towards the willingness to be bound by an NDA. However, it is perfectly reasonable to request confidentiality when you may be discussing perhaps game concepts, ideas, story lines and characters as well as technical and commercial information and so a request to enter into a confidentiality agreement will likely be expected in such circumstances. Such discussions, rather than being carried out under a “one way” confidentiality agreement (where only one party’s information is agreed as being confidential), are more likely to be carried out under a “mutual” confidentiality agreement so that both parties agree that their information is to be considered as being confidential. A mutual confidentiality agreement is more likely to be agreed than a one way agreement as both parties, to varying extents, will be disclosing information of a commercial, technical and financial nature.

Beyond the purpose of the discussions, a written agreement can and ought to cover a number of issues such as how the disclosed information is to be handled, for how long certain categories of information are to remain confidential, what is to be done with written or electronically-held information after discussions come to an end or upon request, what third parties may be permitted to see the provided information (provided they are under confidentiality obligations as well), what may follow if a breach of confidentiality occurs and inspection rights if the recipient party seems to develop, for example, a character or concept which bears a remarkable resemblance to something that was disclosed under the NDA.

Some practical tips to handling your information include:

- + Always think about confidentiality when releasing or sharing information in any situation. What could unauthorised use lead to?
- + Always consider whether an NDA would be appropriate
- + Mark any documentation to be shared with “Confidential”
- + Ensure contracts with employees and contractors contain confidentiality provisions
- + Ensure employees know not to discuss your information in public settings or on social media
- + Remind departing employees of their confidentiality obligations
- + Keep good, comprehensive records throughout the development of your game (including dates) to establish and evidence the development carried out by you
- + When setting up meetings, be polite and raise early that for best practice, you’d like confirmation of confidentiality by a confidentiality agreement. Don’t ambush the other party with it immediately before the meeting

In short, confidentiality is an issue that should be taken seriously at all times as the unexpected and unauthorised use of your commercial and technical information by a third party could seriously affect the marketability and commercial value of your game, which may have been under development for a long time.

Whilst the concept of an NDA is straightforward, the details are essential to get right and if you are in any way concerned about whether an agreement covers your requirements, you should consider seeking legal advice.

What should I do next?

For further information on this document, contact Chris Taylor (christaylor@eatonsmith.co.uk) or John Cotterill (johncotterill@eatonsmith.co.uk) of Eaton Smith LLP’s Corporate and Commercial Team

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