

Maintaining Confidentiality For Your Farm or Agri-Business with Non-Disclosure Agreements

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No matter the size of your farm or agri-business, there might come a time that a Non-Disclosure Agreement (aka “NDA” or Confidentiality Agreement) is appropriate. It is important for farms and agri-businesses to know *when* a NDA is appropriate, *what* it should protect and for *how long*. A misappropriation of confidential information could be devastating for a farm or agri-business.

When Are NDA’s Used

There are two common instances when confidentiality agreements are utilized: (1) when a farm or agri-business is entering into business discussions with another party and (2) when a farm or agri-business wants to bind its employees or independent contractors to keep certain information confidential. For example, if a farmer approached a website developer about his or her proposed online agri-business, that farmer may wish to have a NDA with the website developer to keep the business plan confidential. Alternatively, a farm may wish for a bookkeeper to maintain confidentiality on the operation’s finances.

Is it a One-Way or Two-Way Street?

There are two basic types of NDA: (1) mutual or bilateral and (2) one-sided or unilateral. Most NDA’s with outside parties are bilateral putting responsibilities on all parties to maintain confidentiality; however, if a farm or agri-business is presented with an unilateral NDA, it should be changed. Business discussions are almost always a two-way street --- so should the promise of confidentiality.

What Should a NDA Include?

Generally speaking, a well-drafted NDA should address the following issues:

- (1) Who will be exchanging confidential information?
- (2) What is the purpose of the exchange of confidential information?
- (3) What type of information is to be considered “confidential” for protection under the NDA?
- (4) How can this confidential information be used and by whom?
- (5) How will the secrecy of the confidential information be maintained?
- (6) How long will the confidentiality of the information be maintained?
- (7) What are the consequences of a breach or misuse of the confidential information?

Though it is common for companies to use a generic form NDA, special attention should be given to ensure it properly fits the needs of the parties in that particular situation.

Common Provisions in Mutual NDA's

In most instances, bilateral NDA's should cover the following issues:

- (1) Legal Name of the Parties and Location. The NDA should use the parties' legal name, address, and state of incorporation (if appropriate). It may be prudent to ask the other party for a Certificate of Good Standing from its Department of State.
- (2) Purpose of the NDA. The purpose of the NDA should be properly identified to help narrow what information is to be considered confidential. Furthermore, the NDA should state that usage of confidential information should be limited to this purpose.
- (3) Permitted Parties. Who may or may not be privy to any disclosed confidential information should be clearly identified. This may include employees and independent contractors on a "need to know" basis so long as they are bound by written agreement to maintain confidentiality.
- (4) Identification of Confidential Information. Special attention should be made to how "Confidential Information" is defined in the NDA to ensure it properly includes every possible disclosure. This may include ideas, concepts, know-how, trade secrets, intellectual property, business plans and financial information. Keep in mind that disclosures may be either written or oral; thus, the NDA should state how the Confidential Information will be identified in either form.
- (5) Exceptions (or "Carve Outs"). Typical exceptions to confidentiality include the following: (a) if known prior to the date of disclosure, (b) is in the public domain, (c) was lawfully communicated to the recipient by a third-party, (d) was independently developed by employees, (e) written release by the disclosing party, and (f) when the law requires disclosure (e.g., court order or subpoena) allowing the disclosing party reasonable notice to obtain a protective order.
- (6) Security. The parties to a NDA should take reasonable safeguards to protect the Confidential Information. The other party should be promptly notified in writing if there has been a breach of confidentiality.
- (7) Term. It is always better for the disclosing party to have the longest term possible; however, with mutual NDA's it is best to pick a reasonable term length that is not overly burdensome. A typical term for NDA's in the

business community is three to five years. Please note that some NDA's measure this term from the date of disclosure.

- (8) Procedures Upon Termination. The NDA should discuss how confidential information should be treated at the end of the term. For example, should the recipient return copies or destroy all written materials? May the recipient maintain a copy of all written materials?
- (9) Ownership. It is paramount that the NDA state that the disclosing party retains ownership to the Confidential Information. As a caveat, some NDA's include a "feedback exception" identifying ownership of all suggestions made during business negotiations; however, this may hinder open dialogue.
- (10) Relationship of the Parties. The NDA should note the relationship between the parties. For example, if a farm or agri-business is entering a NDA with an ag-technology company for preliminary business discussions, it should state that the parties *are not in* a joint venture, agency or partnership.
- (11) How Disputes Will be Settled. The NDA should address how a dispute will be settled, under what state's law, and whether attorneys' fees and costs can be recovered for a prevailing party. Most states have a free mediation program for the agriculture community funded in part by the U.S. Department of Agriculture (e.g., New York State Agriculture Mediation Program). The NDA should memorialize any preferences towards Alternative Dispute Resolution ("ADR") including mediation or arbitration. If the parties wish to litigate a dispute or emergency, the NDA should identify which state's courts may be used.

Maintaining Records

Farms and agri-businesses should maintain hard copies of NDA's in a separate "NDA File" that is readily accessible and keep an electronic spreadsheet of all NDA's that the farm or agri-business is a party to along with the following information: (1) parties and contact information, (2) date the NDA was effective, (3) term of NDA and/or expiration date, (4) any duty after the termination of the NDA, (5) any farm or agri-business employees or independent contractors who have been privy to some part of the confidential information under which the business was under the obligation to keep confidential, and (6) any special notes concerning the NDA (e.g., requirement to put oral disclosures in writing within thirty days).

Final Thoughts

Don't get lost in the legalese-- confidentiality agreements can have grave importance for a farm or agri-business. Although the agriculture community has a trusting culture, maintenance of confidential information should not be taken lightly. It is

highly suggested that farms and agri-businesses should speak to a licensed attorney before entering into a confidentiality agreement.

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