

## Proprietary Tech Data

In a recently distributed advisory (Office of Command Counsel Newsletter, August 2000, Volume 2000-4) the proper handling was delineated for proprietary technical data received from others such as contractors. The following response was prepared for a reader of the advisory who requested a clear explanation for understanding of what this term covers.

Initially it should be understood that proprietary data is not limited to data as usually used in our parlance of government terminology. Generally speaking, it is any information developed and possessed by one party that provides a competitive advantage over others. So it can take on various different forms. Outside the government, it is often just referred to as proprietary information. Some examples would be a list of customers that are specific to a company or a specific product/market. Usually this information was compiled by a study involving an investment or the expenditure of some effort or other resources resulting in specialized and valuable information creating an ownership stake. Such information must not be in the public domain so that it is not generally known. When such information is owned or developed by corporations, they may refer to it as a trade secret. It could take the form of technical or test data, specifications (TDPs), or other types of design information but it would not be limited to any of these as long as it complies with the general characteristics of not being known by others and having some value that provides a competitive advantage.

The general practice for maintaining the proprietary status of such protected information when given to a third party outside of a company follows an established procedure. First such information is usually documented in written form. Second, it is clearly labeled as proprietary. Then it is also provided under a restrictive agreement. Typically the agreement is referred to as a nondisclosure agreement wherein the recipient of the proprietary information is obligated to keeping it secret or in confidence while being given a right to use the information in a manner consistent with the business purpose that it was provided for under the release conditions. These agreements generally authorize a use for the proprietary information by the recipient and set up obligations serving to prevent others from accessing so they may learn of it without being subject to maintaining its secrecy.

Violation of the terms of the agreement is actionable under the law as a matter of civil law wherein damages and other measures may be enforced in an attempt to put the owner of the information back into the position they were in before the unrestricted disclosure or breach occurred.

Now since the government must rely on companies and other parties through contracts to perform its mission, federal employees often are in the possession of such information that was developed at private expense or not totally funded by the government. Accordingly we are obligated to protect the information from outside disclosure although we need its use to support our work in carrying out the mission. Due to the extensive use of support contractors in the government, we must always be aware of the status of who receives the information and if that is consistent with the ownership rights of the provider of the information. Access to the information and its use is considered a license. Often the use is

restricted to government purposes. The owner otherwise retains control and property (proprietary) rights over the data/information which usually has to do with its commercial value in the market place.

The access by individuals to such information in a company or in an organization although controlled is not so formalized because they are bound already through previously executed documents to keep it secret. Federal employees are also subject to Federal Law known as the Trade Secrets Act imposing criminal sanctions for unlawful disclosure. Such disclosure would also be inconsistent with the rights of the owner or the party that developed the information. If there is a need to disclose for a government purpose, permission should be obtained from the owner and then also the information is provided under a nondisclosure agreement. The recipient is therefore obligated to respect the ownership rights by not doing anything inconsistent with the rights of the lawful owner of the information who is said to retain proprietary rights in the information.

It should be understood that since each of the circumstances for application of legal terminology and principles are somewhat different, a concise treatment of a particular topic, however informative, is not a substitute for legal advice.

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