



In You They Trust: Confidentiality Clauses and Your Clients' Private Information

Losing control of your clients' confidential information—such as a new planned location, strategic marketing plan, design specifications or growth opportunities—could violate your contract and damage your reputation. Worse, it's not covered by your professional liability insurance.

Most of the news articles about private data and information being made public involve hacker attacks, missing laptops and other devices, or human error that results in valuable data being sent to an unintended (or intended, but inappropriate) recipient.

These stories naturally conjure up images of millions of credit card numbers, health records, and other information that large corporations must keep confidential. Understandably, design professionals reading these articles are tempted to shrug their shoulders and think, "Thank goodness we don't have to worry about that—we don't store such information." But while that might be mostly true, what about the information you do store? What if that were made public?

About that Confidentiality Clause...

Architects and engineers often overlook the confidentiality clause in their client contracts, regarding it as boilerplate language that, while important, doesn't need their immediate attention. It usually reads, in part, something like this:

Engineer agrees that disclosure of Owner's Confidential Information (including Personal Information) by Engineer may cause irreparable damage to the Owner and, in addition to all other remedies available at law or in equity, Owner will have the right to seek equitable and injunctive relief and to recover the amount of damages (including reasonable lawyers' fees and expenses) incurred in connection with that unauthorized use. Engineer will be liable under the Agreement to the Owner for any use or disclosure in violation of this Section by Engineer, its affiliates, or their respective personnel, agents, subcontractors, lawyers, accountants, or other advisors.

XL Catlin's Design Professional policy form defines "confidential business information" in the following way:

"Confidential business information means any printed or digital non-public third party business information...that cannot be lawfully obtained or known by the general public...that [is] provided to the Insured by a third party."

Examples of such information include drawings, designs, customer requirements and specifications, financial information, trade secrets, customer lists, and marketing plans.

Continued

Consider the following scenario:

Your firm has been hired by a major pet supply retailer to design a new chain of aquatherapy facilities for dogs. The chain intends to beat the competition to this type of offering.

Everyone in your firm is excited about this new project, but not everyone understands its confidential nature. One of your employees is so excited about the new project that he posts about it on his favorite social networking site. Soon, your client's competitor learns of the plan and announces that it's breaking ground on a chain of aquatherapy facilities for dogs.

Within weeks, your client files a claim alleging that your firm violated the confidentiality clause in your contract.

While many firms might assume their professional liability (PL) insurance policy would help defray the costs associated with such a claim, the truth is it wouldn't. Since the acts that led to the claim didn't involve a negligent act, error or omission in professional design services, the PL coverage wouldn't be triggered.

"There are certainly competitive advantages one business can gain from knowing another's plans," says Chris Dilenno, an attorney with Mullen Coughlin LLC. (The firm is XL Catlin's designated national breach coach and data privacy counsel, which includes managing XL Catlin's cyber incident hotline.) "The breach of a confidentiality clause or a nondisclosure agreement could make design plans, marketing strategy, financing plans, and even the location of a proposed new business public.

"For example, let's say a firm's client is trying to buy a piece of land for a new fast food restaurant, but is using a holding company to negotiate the price. If the design firm

inadvertently makes that information public, from an RFP, and the company behind the purchase is somehow unmasked, the price of the property soars and the company's plans are now public. The firm could face a substantial monetary demand in a claim for breach of confidentiality."

Dilenno says that while it can be difficult to show the extent of damage caused by a breach of confidentiality, the design firm can still expect a financial impact. "Even if the client can't show particular damages," he says, "there is still the breach of contract. The court might award nominal damages and force the design firm to pay the client's lawyers' fees for not only mitigating the effects of the breach, but also for prosecuting the breach of confidentiality claim against the design firm. Of course, these are in addition to the legal and staff costs the design firm will incur to defend the claim."

Adding to the headaches and costs associated with a claim, there is also the work involved in attempting to halt the information's dissemination. Take our aquatherapy example. As soon as the firm realizes what's happened, it can direct the employee to delete his post. However, it still must confront the possibility that the information was copied and posted elsewhere by third parties. Not only does the effort take time and money, but its success is questionable.

Still Skeptical?

Many readers might review the examples above and think, "Our employees know they shouldn't post information about our projects on the internet. And even if one of our laptops was stolen, or a folder left at a cafe, what are the chances that the people stealing it would recognize the value of the information it contained? After all, what thief is going to care about one of our clients' strategic business plans?"

You'd be surprised, according to Dilenno. "Thieves publish all kinds of information," he says, "just to brag about their find or to try to sell it. The next thing you know, it gets back to the entities involved and you have a breach of confidentiality that not only costs you financially, but also jeopardizes your relationship with your client and maybe with other clients."

Dilenno says it only gets worse if that lost laptop or folder contains financial information. "Your lost files don't have to consist of hundreds of bank account numbers or passwords to wreak havoc," he says. "Financial information could be contained in a single email from one trusted party to another. If it gets out, you'll be advising your client to call its bank, monitor its accounts, and be on the lookout for suspicious activity. Now the client knows you had a data incident that could have been avoided if you hadn't stored sensitive information in an email account."

How to Respond

Dilenno echoes the sentiment of many other experts when he says that it's not a question of "whether" your firm will lose

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the type of information covered by the confidentiality clause, but "when." "Even firms that have painstakingly drafted and implemented procedures for protecting confidential information know that a single human error can undo all their precautions," he says. When that day comes, Dilenno recommends taking the following steps:

- Operate on the assumption that the information will not be recovered and that even if it is, it will have been disseminated.
- Notify your clients. Even if you think there's a good chance you're going to recover the information, there may still be copies out there. Better to be up front with your clients than to have them find out about the breach themselves and call you.
- Report the loss to law enforcement if it potentially involves fraud or theft.
- If the loss includes personal information, such as financial account numbers, report the loss to any regulators or other jurisdictional authorities (e.g., attorney general), as required by law.
- If the loss entails a physical object (e.g., laptop, folder, briefcase), find out if it was recovered.
- Do your best to reconstruct the information that was lost.
- Depending on the jurisdiction, if Social Security numbers were lost, you may have to provide credit monitoring services for anyone affected.
- Depending on the scope of the loss, consider hiring a public relations firm to help notify those affected and to reassure the public and protect your reputation.

How Insurance Can Help

As discussed above, professional liability insurance policies do not cover breaches of confidentiality unless they're caused by negligence in the course of providing professional services. However, that doesn't mean you're without a paddle regarding the transfer of risk related to the confidentiality clause.

"The cyber insurance policies out there really do anticipate and help cover the expense of the many moving parts in these matters," Dilenno says. "They may cover the costs of any needed forensic investigation, the notification of those affected, credit monitoring if necessary, public relations services, and any investigation by the regulatory authorities, all in addition to the costs of defending against a claim or suit."

To help A/Es protect themselves and their firms from claims related to breaches of contract caused by losing confidential information or making it public, XL Catlin now offers Cyber Suite for Design Professionals. Privacy and network security liability coverage includes defense and indemnity for lawsuits that allege an unauthorized disclosure of personally identifiable information, personal health information, or confidential business information. This includes printed or digital materials such as drawings, designs, customer

requirements and specifications, financial information, trade secrets and other confidential information your clients and third parties provide to you.

Policyholders that add this coverage can access a dedicated website that includes additional cyber risk management tools and resources and can also call a 24-hour data breach hotline in the event they face a cyber security event.

It's Not the End of the World

While no one wants to have their clients' confidential information lost, stolen and/or spread across the internet, a scenario like those cited above doesn't have to spell the end of a firm's reputation. By having the right procedures in place to protect the information, appropriately transferring risk (i.e., having the right insurance coverage) and taking the right steps once an incident does occur, you can mitigate the harm a breach can inflict.

"If you respond to the matter thoroughly, quickly and with all due diligence," Dilenno says, "it goes a long way toward preserving your good reputation. You'll show the rest of the design and construction community that you recognize the issues and are committed to compliance with the law and to your clients' privacy."

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