

Protecting data and General Data Protection Regulation (GDPR)

This FAQ sheet forms part of a series prepared by postgraduate students from the University of Manchester's School of Law, in conjunction with the Legal Advice Centre. They are intended as an introductory guide to commonly asked questions by those approaching the Manchester Enterprise Centre when seeking advice on starting up new businesses.

These guides provide only a basic overview on key issues to be considered and do not constitute legal advice. Further detailed advice should be sought as necessary from appropriate professionals such as a solicitor or accountant.

If you are running a business, you may encounter many kinds of information that you wish to protect or be kept confidential. Broadly this falls into 2 categories, personal information that you have on other people and information / data that has commercial significance to the business and needs to be kept confidential.

This FAQ sheet covers the different mechanisms a business has for protecting information, within contract and intellectual property law, as well as its obligations under the Data Protection Act. Specifically the sheet addresses the following questions.

1. What does the law say about data you may hold on people?
2. How do you protect your commercially sensitive data?
3. How can you prevent staff and competitors obtaining your information?
4. How do you protect your intellectual property?
5. Where can you get advice on intellectual property issues?

Q1: What does the law say about data you may hold on people?

The Data Protection Act 1998 (DPA) regulates the handling of personal information by organisations. This is supplemented by the General Data Protection Regulation (GDPR), which came into effect in May 2018. It ensures information is kept private and can be accessed upon request. This means people you hold information about have a right to see that information and check it is correct.

Does it apply to you?

Yes, regardless of the size or type of your business, if you are storing the personal details of any individual connected to your organisation you need to comply with the DPA and GDPR. This applies to any class of individual, such as customers, shareholders and suppliers, as well as your employees.

The Act and Regulation also cover most uses of data, including obtaining, recording, holding and erasing information, on paper or electronically.

Common examples are contact details, such as an address you obtain from a consumer placing an order, their sales records, or the price at which shares were sold to a shareholder. The Act also covers CCTV footage.

What is the ICO?

The Information Commissioner Office (ICO) is responsible for overseeing data protection and promoting good practice. This involves managing the register of businesses that process personal information and handling complaints from the public.

Although they do have powers to issue financial penalties, this is only for serious or continued breaches of the Act and Regulation. They usually issue advice and instruction to businesses as to a certain action or to cease a practice, and resolve the issue informally.

Do you need to notify and register with ICO?

Only some businesses need to do this. You can check whether this applies to you at: http://ico.org.uk/for_organisations/data_protection/registration/self-assessment.

Only some types of data processing will require registration. For example if your organisation is processing information for accounting, auditing or crime prevention purposes.

There is a modest flat fee for registration.

What are the duties within the DPA and GDPR?

The DPA outlines certain principles of good data handling, such as data should be processed fairly and lawfully and for specific purposes.

You need to make sure you keep personal data, and particularly sensitive personal data (including things like someone's racial origins or political opinions) securely.

Most importantly, you should also make sure you obtain the subject's consent, and make sure you only have personal data necessary for a specific purpose. For example, do not collect extra data in case you may need it at a later date. Consent must also be specific, and not relating to general data gathering.

You may also have a business policy on data handling, such as T&C's available on your website. It can also mean having a staff training scheme or nominating certain employees to be responsible for compliance. You will also need to make personal information available to the subject of the data if they request to see it. This is called a Subject Access Request and there are strict timescales within which you must respond.

Where do you start?

Look at the records being kept by your business, and assess the extent to which they contain personal data and therefore come within the Act and Regulation. You will then need to put in place some data protection measures.

There are many useful tools available on the ICO website. Use the following self-assessment questionnaire to get an idea of the steps you must take. It is also useful for seeing what kind of data use falls within these laws.

<https://ico.org.uk/for-organisations/improve-your-practices/data-protection-self-assessment-toolkit/>

There is a lot of useful information and guidance on the Information Commissioner's website to help you, so you should start by looking here:

<https://ico.org.uk/for-organisations/guide-to-data-protection/>

The following website also has downloadable templates and leaflets, such as information guides for staff.

www.getsafeonline.org/business/resources

Q2: How do you protect your commercially sensitive data?

Use a non-disclosure agreement (NDA)

Also known as a confidentiality agreement, this is a legal contract by which two parties agree to share confidential information.

A one-way NDA ('unilateral') is one person is sharing information, as compared to a two-way agreement ('bilateral') where both parties have information to share.

Putting this into context

- Information can be business-related, such as the details of an upcoming advertising campaign, or financial information that needs to be disclosed to potential investors.
- Information can also be technical in nature. If a company is preparing to apply for a patent, the information regarding the invention should be kept confidential. If it enters the public domain the application will no longer meet the requirement of being 'new' and will be refused. It may also be detrimental to the business if this information goes public as it can be copied by competitors.
- Some information is excluded from IP protection, such as methods of doing business or computer software are excluded from patent law. You may still want this information to remain confidential.
- A company may wish to share trade secrets with employees, but wishes this information to remain confidential after the employment has ended. This prevents an employee sharing information with a new employer in the same industry, or even starting their own business using trade secrets or customer lists.

What information does this protect?

Any information that is not generally known. For example, if the other party to the contract comes across information already in the public domain, this will not be confidential.

Likewise, a person also cannot be prevented from using their skill and knowledge in a particular area, even if they acquired this whilst working for you.

What to include in the contract

- The parties or people making the contract.
- How long the confidentiality period will be. 3-5 years is common.
- The disclosure period, during which the disclosures will be made.
- Specifically define the information that is to be kept confidential, and whether written or spoken.
- Obligations under the contract, for example to disclose to others only on a 'need to know' basis.
- Exclusions under the contract, for example if the recipient had prior knowledge or came across the information another way.

There are templates available online, such as:

<http://www.ipwatchdog.com/tradeseecret/sample-confidentiality-agreements/>

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/592212/Example-Mutual-Non-Disclosure-Agreement.pdf

You can use these to give a general idea, but they should not be seen as a 'one size fits all' solution. Whatever you include, the terms should fit your individual circumstances, which makes it easier for a court to enforce.

Other measures to ensure information remains within your business

Because of the costs of enforcing an NDA in court, it is more of a last resort. It is advisable to make sure information remains confidential by other means, such as having strong password protection, physically locking documents away and only disclosing information to staff where necessary.

Q3: How can you prevent staff and competitors obtaining your information?

You could use a non-poaching clause. This is a type of restriction, (also known as a non-solicitation clause), which you could put into employment contracts for key staff. It prevents a person or competing business from enticing staff or clients away from your business. So this can be also be a clause within an NDA, between two companies agreeing not to 'poach' each other's staff, or with an employee to cover situations where they start their own business and take company employees with them.

What to include?

- Because this restrictive agreement limits both trade and an employees right to work, it is important you make this clause as narrow as possible.
 - Blanket obligations against all employees, indefinitely and in all areas are more likely to be found unreasonable and therefore unenforceable.
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Factors to consider

- Length of restriction. A common amount of time is 6 months from when the employee stopped work.
- Geographical scope. It is also common to apply the clause competitors within a specific geographical area, such as Manchester or within a defined radius from your business.
- Which employees. For example managers who have the most client contact, as opposed to more junior staff.
- Which competitors.

Are there any other restrictive agreements that can be put in staff contracts?

- Non-compete: This prevents a person from directly competing or working for a competitor, usually within a specific area and/or for a specific amount of time.
 - Non-dealing: This type of restriction prevents a person from working for your customers, clients and suppliers for a specific period of time.
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Enforcement of a contract

As a legal document, you can go to court to enforce a term or clause within the overall contract, if the other party has done something to break this contract. But it is important to assess whether the benefits of going to court outweigh the costs, as it can be expensive to undertake a claim and you need to think about the risks of losing and being liable for the other side's legal costs.

So be realistic in any clauses you use and look to resolve disputes informally before you resort to court action. Another option to consider is mediation (see 'How to challenge infringements' section below).

Q4: How do you protect your intellectual property?

Successful innovation hinges on the application of creativity to commercial opportunities. Key to sustaining that success is dependant to a large degree on the ability to protect that creativity. There are a number of mechanisms available but which one you use is dependant on how the physical manifestation of that creativity, e.g. function and composition - patents and trade-secrets, form and aesthetics – design rights, identification – trademarks and works of art – copyright.

This FAQ sheet will focus on copyright and patents, both of interest within the university environment when looking to protect ideas and to commercialise research. Patents being key to the hard sciences particularly when looking to secure funding. Information on the other types of protection mentioned above can be found at the Intellectual Property Office website (<https://www.gov.uk/government/organisations/intellectual-property-office>).

Registering a patent

The most simple route to patent protection is to obtain a UK patent, which will take effect within the UK. To do so you need to apply to the Intellectual Property Office as this form of protection requires registration.

The Office will carry out an assessment of your application against certain criteria. These are that your invention adds something new to the particular technical field. It also has to be an 'inventive' concept, not just a simple alteration to an existing invention. It must also be industrially applicable in that it is capable of being made and used.

Going forward, it may be helpful to carry out a search for similar patents to yours, to get an idea of the layout and content expected in an application, but also to see if there are similar inventions out there which could mean yours being refused. At the Business and Intellectual Property Centre (BIPC - see below), you can get advice and access to databases which will help you do this.

Acquiring copyright

Copyright automatically arises once you have created a work that falls within certain categories. The most common being literary, dramatic, musical and artistic works. Copyright also arises in photographs and films.

The categories themselves are fairly wide. For example, any piece of writing will qualify as a literary work. If the work fits into one of these categories, the only requirements are that you are the author of the work.

How to challenge infringements

Once registered successfully, you own the rights over that invention or work and can control others from using, working or copying it without your permission. If you do find someone doing so, you can take action by starting infringement proceedings in court.

It is possible for you to give permission for them to use your work, and perhaps charge a fee in return. This then prevents their use from being an infringement.

Having a patent also enables you to challenge a later patent application made by someone else, over an invention that is similar or the same as yours. This isn't infringement but you can challenge their application at the office and hopefully prevent it from being registered in the first place.

Before starting court proceedings, it is worth considering mediation. This is a faster, lower cost alternative to court but still involves the use of a trained and neutral professional who assists you in reaching an agreement. Like a court case, this procedure is also confidential. Before starting a claim, courts may expect you to attempt this route first.

If you do not want to do this or are unsuccessful, you will need to make a claim. Where your case is heard depends on the value of your claim, see here for more information:

<https://www.gov.uk/defend-your-intellectual-property/take-legal-action>

Q5: Where can you get advice on intellectual property issues?

You can get free advice on intellectual property issues from a number of sources, but for complicated matters it may be worth consulting an IP professional.

The Business and Intellectual Property Centre (BIPC) Central Library in Manchester.

Here they run both a patent and an intellectual property clinic for which you can make appointments, as well as a drop-in service for start-up business advice.

http://www.manchester.gov.uk/info/500138/central_library/6316/what_you_can_do_at_central_library/5

Address: **Manchester Central Library, St Peter's Square, Manchester, M2 5PD**

Email: patlib@manchester.gov.uk

Phone: **0161 234 1983**

The Intellectual Property Office:

<https://www.gov.uk/government/organisations/intellectual-property-office>

Address: **Concept House, Cardiff Road, Newport, South Wales, NP10 8QQ**

Email: enquiries@ipo.gov.uk

Phone number: **0300 300 2000**

A helpful link is this online tool designed by the IPO to help you carry out a self-assessment about your IP and how to protect it. The personalised guide that will be created after you answer questions would be useful to look at before seeking legal advice:

<https://www.ipo.gov.uk/iphealthcheck>

In terms of paying for legal advice, one option is to consult a patent or trademark attorney, who are trained advisors, along with solicitors. You can find a local attorney on the following websites:

<http://www.cipa.org.uk/> - for patent attorneys.

<https://www.citma.org.uk/home> - for trademark attorneys.