

# KTI Practical Guide

## Confidentiality Agreements



## Foreword

The KTI Practical Guides have been produced as a resource for those approaching transactions between Irish research performing organisations (RPOs)<sup>1</sup> and commercial companies. Each Practical Guide explains common terms in the agreements and describes the considerations that might apply.

The KTI Model Agreements contained in each Practical Guide take account of the legal constraints upon RPOs when entering into contracts, as well as the unique nature of RPOs, whose primary purpose is not-for-profit rather than commercial. At the same time, the terms of the agreements seek to address the typical commercial priorities of companies, e.g. to have access to intellectual property rights. The Guides are based on European best practice.

The Practical Guides are offered as a starting point for drafting and discussion, as required. Neither companies nor RPOs are mandated to use the Model Agreements.

The KTI Practical Guides and Model Agreements are available on the KTI website to download and use directly. [www.knowledgetransferireland.com](http://www.knowledgetransferireland.com)

## Disclaimer

*Parties should take their own legal advice on the suitability of any model agreement for their individual circumstances and on associated legal and commercial issues. None of Knowledge Transfer Ireland, Enterprise Ireland nor any of the individuals or organisations who have produced or commented on these documents assumes any legal responsibility or liability to any user of any of these model agreements or commentaries.*

The KTI Practical Guides and Model Agreements were prepared by Anderson Law LLP (Oxford, UK; [www.andlaw.eu](http://www.andlaw.eu)) with advice on certain Irish law issues from LK Shields Solicitors (Dublin, Ireland; [www.lkshields.ie](http://www.lkshields.ie)).

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<sup>1</sup> RPOs are considered to be Higher Education Institutes (Universities and Institutes of Technology) or State research organisations

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## Introduction to CDAs

### What is a CDA or NDA?

CDA is an abbreviation for “confidential disclosure agreement”. Sometimes the term “NDA” is used, standing for “non-disclosure agreement”. Whether these names are used, or you simply refer to a “confidentiality agreement”, the same type of agreement is usually envisaged. For convenience and brevity they are referred to as CDAs in this Practical Guide.

A CDA is a contract governing the disclosure of confidential information from one party to another – the disclosure may be mutual (i.e. both/all parties disclosing confidential information), or there may be just disclosure by one party to the other(s).

Confidential information, in the current context, means information which is of value due to it not being generally known. It will often comprise details of scientific research, such as chemical formulae, software development information, data arising from a research or development project, etc. or indeed any other information in a party’s possession provided it has what is known as the ‘necessary quality of confidence’. Confidential information, as understood in Irish law, is not limited to the written or printed word and for example an image can also comprise confidential information.

### Why do I need a CDA?

Having to sign CDAs may at first seem rather alien, and you may feel that you would rather not ask another party to enter into a CDA, especially if you are dealing with this other party on a perceived ‘friendly’ basis and are hopeful of entering into what may be a long-term valuable research collaboration. This approach is unwise and ensuring that CDAs are in place is not only absolutely necessary in many circumstances, but is generally the best way in which to protect your confidential information.

The benefits of having a CDA in place may, in particular cases, include the following:

- to help establish that an invention has not been publicly disclosed prior to filing a patent application;
- to help establish that any unpatented know-how that has been developed has not been publicly disclosed and can be licensed in addition to, or instead of, licensing patents;
- to establish that the recipient of the information is bound by obligations of confidentiality. Although such obligations can sometimes arise without a CDA being signed, it is generally much better to have a CDA in place. From the point of view of seeking an injunction (or other legal remedy, e.g. damages) in relation to the other party’s breach, having a CDA in place is extremely helpful when seeking to convince the court of the need for such an injunction or other remedy; and
- as well as providing certain legal remedies if the other party breaches the terms of your CDA, entering into a CDA has other very direct, immediate and practical benefits, such as making it very clear to the other party that the information in question is indeed confidential, and clearly identifying what the confidential information actually is, which can avoid future disputes.

In order to protect fully an organisation’s confidential information, the CDA must be properly drafted and identify the confidential information in question and the limitations on its disclosure and use. Obviously, in order for a CDA to be workable, there is an onus on the organisation to actually *keep* its confidential information confidential, and efforts must be made to ensure this happens.

### Can my organisation comply with a CDA?

With some types of organisation it may be queried whether they should enter into CDAs at all and, if they do, whether realistically they are fully capable of complying with the CDA's terms. In relation to RPOs, one consideration is that one of the main purposes of an RPO is to disseminate knowledge. The free exchange of information and ideas between researchers is an important aspect of their career within the RPO. Where research is classified as 'academic research', it may be incompatible with that status for it to be kept permanently secret. All RPOs will be cautious about accepting confidentiality obligations without having robust CDA management provisions in place.

### Who should draft the CDA?

CDAs are sometimes drafted by the disclosing party, and sometimes by the recipient.

Some organisations, when presented with a CDA to sign, respond by proposing their own favoured form of CDA, stating that this is their organisation's policy, or that using their own form of CDA will avoid the need for them to obtain legal advice on the externally drafted CDA.

Negotiation can sometimes be smoothed if a two-way CDA is proposed, even if one of the parties is not expected to contribute much in the way of confidential information.

To speed up signature it is recommended that the appropriate Model CDA be used.

### How many pages long should the CDA be?

Most CDAs are generally two or three pages long, and for the disclosure of routine, albeit confidential information, this level of detail will generally be considered sufficient. Obviously, the more important and valuable the information, the more concerned one would usually be to cover all confidentiality issues thoroughly, resulting in a more lengthy document.

### Format of the CDA

Simple CDAs are often drafted in the form of a letter from one party to the other, which the recipient of the letter signs and returns to indicate his agreement to comply with its terms. Whether a CDA is drafted in this format or in a conventional 'agreement' format, or even in some other format, is often just a matter of stylistic preference.

### Key issues

- *Templates.* To speed up signature, use of the Model CDAs (one-way and two-way) is encouraged.
- *Terms.* Possible key issues might include:
  - Law and jurisdiction (is it covered by relevant insurance policies?)
  - Must oral information be confirmed in writing? Must information be marked 'confidential'?
  - Duration of confidentiality obligations (depending on subject matter)
  - Whether warranties or indemnities can be accepted in CDAs
  - Including wording to clarify that neither party is obliged to negotiate or enter into any further agreement (e.g. a research agreement or licence agreement)
  - Is the organisation liable if the individual researcher breaches the terms of the CDA?
- *Monitoring.* The RPO will implement procedures to monitor confidentiality obligations, including maintaining a database of CDAs.

### Important points to note about the Model CDAs

The reader faced with drafting a confidentiality agreement must always keep in mind that a template can only ever be a starting point. The specific circumstances of the particular arrangement must

always be considered and the template tailored as appropriate. For example, a number of fact specific, complex issues may be raised when drafting a confidentiality agreement, which by their nature cannot be dealt with in a template. Examples of these issues include the following:

- The Model CDAs have not been drafted to take account of the individual requirements of Irish RPOs which might apply. Readers are advised to seek out and address, by additional provisions, any peculiarities or requirements of a relevant RPO.
- The Model CDAs have not been drafted to be used by or in relation to consumers. Contracts concluded with consumers are obliged to include an additional layer of legal protections, to be written in plain-spoken language, and to contain other features imposed by consumer-specific laws which are beyond the scope of this Practical Guide.
- In addition, the reader should be aware that in some situations the law relating to 'state aid' might need to be considered (e.g. in relation to 'information exchanges'). This is a complex area and there is no 'one-size-fits-all' way of dealing with it. Accordingly, the reader should seek specialist advice when required.

## Checklist of Preliminary Issues and Provisions Commonly Found in CDAs

<b>Preliminary</b>	
<b>Parties</b>	<ul style="list-style-type: none"> <li>• Should the parties be the employing organisations of the relevant researchers?</li> <li>• Have the correct legal names and addresses been included?</li> <li>• Should the individual researchers sign – as parties or to state they have “read and understood”?</li> <li>• Does the CDA refer to group companies being a party? Are the references appropriate? Does the signatory have authority to sign on behalf of group companies?</li> </ul>
<b>Authorised signatory</b>	<ul style="list-style-type: none"> <li>• Does the CDA need to be signed by a central part of the organisation, e.g. in an RPO, a Technology Transfer Office or in a company, perhaps a legal department?</li> <li>• Do you need to remind the ‘other side’ regarding their authorised signatory?</li> </ul>
<b>Who is disclosing?</b>	<ul style="list-style-type: none"> <li>• Is it the RPO or the other party or both? Is a one-way or two-way CDA required?</li> </ul>
<b>What type of information?</b>	<ul style="list-style-type: none"> <li>• Is it to be commercial information such as business proposals or financial accounts, or scientific information such as the results of experiments or an unpublished patent application? Who should be authorising the disclosure of such information?</li> </ul>
<b>How sensitive is the information?</b>	<ul style="list-style-type: none"> <li>• Some types of information are more confidential than others, e.g. secret chemical formulae may be more valuable as a secret than, say, some unpublished accounts that will be filed with the Companies Registration Office within the next few months. Should any of this information be withheld, as being too sensitive to disclose, even under a CDA?</li> </ul>
<b>Advantages or disadvantages of disclosure?</b>	<ul style="list-style-type: none"> <li>• Upside? For example, will disclosure of the information enable the recipient to progress a project, e.g. to consider whether to enter into a further agreement with the disclosing party, or to provide a service to the disclosing party?</li> <li>• Downside? Will disclosure result in the loss of a competitive advantage, or the opportunity to file patents, or some other adverse consequence?</li> <li>• How do the advantages of disclosure compare with the disadvantages that may result, e.g. if the information is misused by the recipient or is leaked into the public domain?</li> </ul>
<b>Definitions</b>	
<b>Meaning of Confidential Information</b>	<ul style="list-style-type: none"> <li>• Can the Confidential Information be described easily in a sentence?</li> <li>• If there are several types/levels of Confidential Information, consider listing them in a schedule</li> <li>• Check the Confidential Information listed is what the relevant researcher expects</li> <li>• How broad is the definition of Confidential Information? Should you attempt to narrow/broaden the definition? For example, if it is limited</li> </ul>

	<p>to information concerning a particular chemical compound, is this too narrow if discussions broaden to other compounds?</p> <ul style="list-style-type: none"> <li>• If the definition of Confidential Information includes various other confidential documents, then make sure to check relevant IP, publication and confidentiality clauses in those related documents.</li> <li>• Is the definition limited to information that is (a) in writing, (b) marked confidential, (c) if disclosed orally, confirmed in writing, etc.? Are these restrictions appropriate and workable?</li> </ul>
<b>Term</b>	<ul style="list-style-type: none"> <li>• Does the CDA specify a time period? Should it?</li> <li>• Is it clear whether any time period is for (a) disclosure of information under the CDA, and/or (b) maintaining the confidentiality of information, once disclosed under the CDA?</li> <li>• Are there any obligations (e.g. return of information) when the term ends?</li> <li>• Should you include termination provisions?</li> </ul>
<b>Meaning of Recipient</b>	<ul style="list-style-type: none"> <li>• Is the CDA drafted so that Recipient means the recipient scientist or the recipient organisation – or both?</li> <li>• Should any changes be made so that the recipient scientist does not give personal warranties?</li> </ul>
<b>Meaning of Disclosing Party</b>	<ul style="list-style-type: none"> <li>• Does this definition specify the correct legal name and official address of the organisation disclosing the confidential information?</li> </ul>
<b>Obligations</b>	
<b>Non-disclosure and non-use</b>	<ul style="list-style-type: none"> <li>• Are the restrictions on disclosure too narrow or too broad?</li> <li>• Have restrictions on use been included?</li> <li>• Is any permitted use focussed on future agreements between the parties? Or otherwise appropriate?</li> </ul>
<b>Standard exceptions</b>	<ul style="list-style-type: none"> <li>• Has “independent development” been included as an exception? Should it be included?</li> <li>• If disclosure to court, etc. is permitted, should the disclosing party be given an opportunity to seek confidential treatment of the information by the court?</li> </ul>
<b>Disclosure to employees etc.</b>	<ul style="list-style-type: none"> <li>• Is disclosure to employees permitted? Are there any conditions on such disclosure (e.g. signature of CDA with the employees?)</li> <li>• Is disclosure to students, consultants, etc. permitted? Is this acceptable? Conditions?</li> </ul>
<b>Security and safety measures by Recipient</b>	<ul style="list-style-type: none"> <li>• Does the CDA specify that information will be kept secure / in a particular location?</li> <li>• Is copying permitted?</li> <li>• Can the researcher comply / have you procedures in place to ensure s/he understands the obligations?</li> </ul>
<b>Return of information</b>	<ul style="list-style-type: none"> <li>• Does the CDA include provisions as to the return of the confidential information?</li> <li>• Is the recipient permitted to retain one copy of the information in its legal files?</li> </ul>
<b>Law and Jurisdiction</b>	<ul style="list-style-type: none"> <li>• Has the law governing the CDA been stated?</li> <li>• Has jurisdiction also been specified (i.e. which party’s courts would hear any dispute)?</li> <li>• Is it appropriate to specify exclusive or non-exclusive jurisdiction?</li> </ul>

## Model one-way CDA including drafting points

Dated \_\_\_\_\_20[●]

(1) [Full legal name of the RPO]

and

(2) [Full legal name of the Company]

## **MODEL ONE-WAY CONFIDENTIAL DISCLOSURE AGREEMENT**

# ONE-WAY<sup>i</sup> CONFIDENTIAL DISCLOSURE AGREEMENT<sup>ii iii iv v</sup>

This Agreement dated \_\_\_\_\_ 20[●]<sup>vi</sup> is between:

- (1) [●] (the “RPO”), [an academic institution incorporated or established under [statute or charter in Ireland],] whose [principal address or registered office] is at [●]<sup>vii</sup>; and
- (2) [●] (the “COMPANY”), [a company incorporated in [●] under registration number [●],] whose [principal place of business or registered office] is at [●]<sup>viii</sup>.

The RPO and the COMPANY together shall be referred to as the “Parties”, and “Party” shall mean either one of them.

## Background:

The Parties wish to hold discussions in the field of [●]<sup>ix</sup> (the “Field”). The COMPANY wishes to receive confidential information in the Field from the RPO for the purpose of considering whether to enter into a further agreement with the RPO (the “Permitted Purpose”).

## The Parties agree as follows:

### 1. Definitions

1.1. In this Agreement, the following words shall have the following meanings:

<b>Authorised Persons</b>	shall have the meaning given in clause 3.1.
<b>Confidential Information</b>	shall mean: <ol style="list-style-type: none"> <li>(a) in respect of Information provided in documentary form or by way of a model or in other tangible form, Information which at the time of provision is marked or otherwise designated to show expressly or by necessary implication that it is imparted in confidence; and</li> <li>(b) in respect of Information that is imparted orally, any information that the RPO or its representatives informed the COMPANY at the time of disclosure was imparted in confidence<sup>x</sup>; and</li> <li>(c) in respect of Confidential Information imparted orally, any note or record of the disclosure [and any evaluation materials prepared by the COMPANY that incorporate any Confidential Information]; and</li> <li>(d) any copy of any of the foregoing; and</li> <li>(e) [the fact that discussions are taking place between the COMPANY and the RPO<sup>xi</sup>.]</li> </ol>
<b>Information</b>	shall mean information [whether of a technical, commercial or any other nature whatsoever] provided directly or indirectly by the RPO to the COMPANY in oral or documentary form or by way of models, biological or chemical materials or other tangible form or by demonstrations and whether before, on or after the date of this Agreement.

### 2. Confidentiality obligations

- 2.1. In consideration of the RPO providing Confidential Information, at its discretion, to the COMPANY, the COMPANY shall:
  - 2.1.1. keep the Confidential Information secret and confidential;
  - 2.1.2. neither disclose nor permit the disclosure of any Confidential Information to any person, except for disclosure to Authorised Persons in accordance with clause 3, or to a court or other public body in accordance with clause 4;
  - 2.1.3. not use the Confidential Information for any purpose, whether commercial or non-commercial, other than for the Permitted Purpose;
  - 2.1.4. [make [no copies of the Confidential Information] [only such limited number of copies of the Confidential Information as are required for the Permitted Purpose, and provide those copies only to Authorised Persons];<sup>xii</sup>] and
  - 2.1.5. take proper and all reasonable measures to ensure the confidentiality of the Confidential Information.

### 3. Disclosure to employees

- 3.1. The COMPANY may disclose the Confidential Information to those of its officers, employees [and professional advisers] (together, the “**Authorised Persons**”) who:
  - 3.1.1. reasonably need to receive the Confidential Information to enable the COMPANY to achieve the Permitted Purpose;
  - 3.1.2. have been informed by the COMPANY (a) of the confidential nature of the Confidential Information, and (b) that the RPO provided the Confidential Information to the COMPANY subject to the provisions of a written confidentiality agreement;
  - 3.1.3. have written confidentiality obligations to the COMPANY that (a) are no less onerous than the provisions of this Agreement, and (b) apply to the Confidential Information, and who have been instructed to treat the Confidential Information as confidential<sup>xiii</sup>;
  - 3.1.4. [in the case of the COMPANY’s professional advisers] [other than its solicitors], [have been provided with a copy of this Agreement and] have agreed with the COMPANY in writing to comply with the obligations of COMPANY under this Agreement, [and, should it opt in writing to do so, the RPO will be entitled to be a party to that agreement]<sup>xiv</sup>; and
  - 3.1.5. [in the case of the COMPANY’s solicitors, have confirmed that they will treat the Confidential Information as if it were the COMPANY’s confidential information and therefore subject to the rules of the Law Society of Ireland concerning client information<sup>xv</sup>.]
- 3.2. The COMPANY shall be responsible for taking reasonable action to ensure that its Authorised Persons comply with the COMPANY’s obligations under this Agreement and, without prejudice to any other right or remedy of the RPO, shall be liable to the RPO for any breach of this Agreement by such Authorised Persons.

### 4. Disclosure to court, etc.

- 4.1. To the extent that the COMPANY is required to disclose Confidential Information by order of a court or other public body that has jurisdiction over the COMPANY, it may do so. Before making such a disclosure the COMPANY shall, if the circumstances permit:
  - 4.1.1. inform the RPO of the proposed disclosure as soon as possible (and if possible before the court or other public body orders the disclosure of the Confidential Information);

- 4.1.2. ask the court or other public body to treat the Confidential Information as confidential; and
- 4.1.3. permit the RPO to make representations to the court or other public body in respect of the disclosure and/or confidential treatment of the Confidential Information.

## 5. Exceptions to confidentiality obligations

- 5.1. The COMPANY's obligations under clause 2 shall not apply to Confidential Information that:
  - 5.1.1. the COMPANY possessed before the RPO disclosed it to the COMPANY; or
  - 5.1.2. is or becomes publicly known, other than as a result of breach of the terms of this Agreement by the COMPANY or by anyone to whom the COMPANY disclosed it; or
  - 5.1.3. the COMPANY obtains from a third party, and the third party was not under any obligation of confidentiality with respect to the Confidential Information; or
  - 5.1.4. it can show (as demonstrated by its written records or other reasonable evidence) has been developed by any of the COMPANY's employees who have not had any direct or indirect access to, or use or knowledge of, the RPO's Confidential Information.

## 6. Return of information and surviving obligations

- 6.1. Subject to clause 6.2, the COMPANY shall (a) at the RPO's request, and (b) upon any termination of this Agreement:
  - 6.1.1. either return to the RPO or destroy (at the RPO's option) all documents and other materials that contain any of the Confidential Information, including all copies made by the COMPANY representatives;
  - 6.1.2. permanently delete all electronic copies of Confidential Information from the COMPANY's computer systems; and
  - 6.1.3. provide to the RPO a certificate, signed by an officer of the COMPANY, confirming that the obligations referred to in clauses 6.1.1 and 6.1.2 have been met.
- 6.2. As an exception to its obligations under clause 6.1, the COMPANY may retain one copy of the Confidential Information, in paper form, in the COMPANY's legal files for the purpose of ensuring compliance with the COMPANY's obligations under this Agreement.
- 6.3. Following the date of any termination of this Agreement<sup>xvi</sup>, or any return of Confidential Information to the RPO ("**Final Date**"), (a) the COMPANY shall make no further use of the Confidential Information, and (b) the COMPANY's obligations under this Agreement shall otherwise continue in force, in respect of Confidential Information disclosed prior to the Final Date, in each case [for a period of [1] [5] [10] [15] [20] years from the [date of this Agreement][Final Date]] [without limit of time]<sup>xvii</sup>.

## 7. General

- 7.1. The COMPANY acknowledges and agrees that all property, including any intellectual property, in the Confidential Information shall remain with and be vested in the RPO.
- 7.2. This Agreement does not include, expressly or by implication, any representations, warranties or other obligations:
  - 7.2.1. to grant the COMPANY any licence or rights other than as may be stated in this Agreement;

- 7.2.2. to require the RPO to disclose, continue disclosing or update any Confidential Information;
  - 7.2.3. to require the RPO to negotiate or continue negotiating with the COMPANY with respect to any further agreement, and either Party may withdraw from such negotiations at any time without liability; nor
  - 7.2.4. as to the accuracy, efficacy, completeness, capabilities, safety or any other qualities whatsoever of any information or materials provided under this Agreement.
- 7.3. This Agreement shall be governed by and construed in accordance with the laws of the Republic of Ireland and each Party agrees to submit to the [non-]exclusive jurisdiction of the courts of the Republic of Ireland<sup>xviii</sup>.

**Agreed by the Parties through their authorised signatories:**

**For and on behalf of**  
*[Insert full legal name of the RPO]*

**For and on behalf of**  
*[Insert full legal name of the COMPANY]*

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

## Drafting Notes:

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<sup>i</sup> This CDA is appropriate for use when the RPO is providing confidential information to a third party but will not be in receipt of any of the third party's confidential information. If at the beginning of the discussions it is unclear whether confidential information will be exchanged by both parties, it may be more appropriate for the parties to enter into a two-way CDA to ensure that both parties are bound by the obligations of confidentiality.

<sup>ii</sup> This CDA includes a number of alternative provisions, which are shown in square brackets. An explanation of when these alternative provisions may be used is provided in the corresponding footnote.

<sup>iii</sup> Users of this Model Agreement should note that the authors have not drafted it to take account of the individual requirements of Irish RPOs which might apply. Users are advised to seek out and address by additional provisions, any peculiarities or requirements of a relevant RPO.

<sup>iv</sup> Users of this Model Agreement are advised that the authors have not drafted it to be used by or in relation to consumers. Contracts concluded with consumers are obliged to include an additional layer of legal protections, to be written in plain-spoken language and to contain other features imposed by consumer-specific laws which are not dealt with in this template.

<sup>v</sup> Users of this Model Agreement should be aware that in some situations the law relating to 'state aid' might need to be considered (e.g. in relation to 'information exchanges'). This is a complex area and there is no 'one-size-fits-all' way of dealing with it. Accordingly, the user should seek specialist advice when required.

<sup>vi</sup> This should be the date on which the last party signs, and should be inserted by the last signatory on that date.

<sup>vii</sup> Insert the full name of the RPO, the statute or charter under which it was incorporated or established, and its principal/registered address. Individual RPOs will have their own legal formalities which will need to be completed to bind the RPO.

<sup>viii</sup> Insert the full name of the company (or other entity), its incorporation number, and its principal/registered address. This Model Agreement has been designed for use with a commercial entity.

<sup>ix</sup> Insert a description of the relevant field.

<sup>x</sup> Some recipients require orally disclosed confidential information to be confirmed in writing, but for many RPOs this requirement may present potential difficulties and the benefit of the CDA may be lost through an administrative oversight.

<sup>xi</sup> Many commercial organisations do not want the fact that discussions are taking place with an RPO to be in the public domain. The RPO however may wish to use this information for marketing purposes. Therefore, it needs to be weighed up on a case-by-case basis whether it is appropriate for the RPO to agree to any request to keep knowledge of the discussions confidential.

<sup>xii</sup> If the information is particularly sensitive, the RPO may require the Company to keep records of all individuals who have received the confidential information and/or to stipulate the names of the individuals to whom the information may be disclosed.

<sup>xiii</sup> This clause should usually be uncontroversial. The RPO should be aware that if the Company pushes back on this point then it may be inappropriate for the RPO to disclose confidential information to the Company, if the Company's employees are not bound by any confidentiality obligations.

<sup>xiv</sup> The Company may need to disclose the information to external advisers. The RPO should consider if this is acceptable. Some advisers may have conflicts of interest or may also act for competitors of the RPO. The RPO should consider if it should enter directly into a CDA with the external adviser so as to give it a right to bring legal proceedings directly against the advisor if the advisor is in breach of the CDA.

<sup>xv</sup> This clause is drafted to apply to solicitors. Most CDAs do not include such a provision.

<sup>xvi</sup> This CDA, and many others, does not include a termination provision. In cases where the parties enter into a further contract, the CDA typically will be superseded by the confidentiality provisions in that agreement. Alternatively, the CDA will continue until one party gives reasonable notice to the other party that it no longer wishes the CDA to continue.

<sup>xvii</sup> The RPO will need to decide what is an appropriate duration given the confidential information being disclosed. It may be that the RPO decides that the information should be treated as confidential for as long as it does not fall within an exception of clause 5. Many organisations will however not agree to unlimited obligations and will request a definitive date on when the obligations cease. It is important to consider external influences. For example, the information technology market is fast moving and therefore long periods of confidentiality may not be appropriate. Many CDAs contain a provision of 5 years.

<sup>xviii</sup> Where this Model Agreement is adapted to be used to govern the performance of obligations in a jurisdiction outside of the Republic of Ireland, users should note that their ability to enforce the rights and obligations set out here may be subject to the law of that jurisdiction and that local legal advice may need to be sought.

## Model two-way CDA including drafting points

Dated \_\_\_\_\_ 20[•]

(1) [Full legal name of the RPO]

and

(2) [Full legal name of the Company]

**MODEL TWO-WAY CONFIDENTIAL DISCLOSURE AGREEMENT**



## TWO-WAY<sup>i</sup> CONFIDENTIAL DISCLOSURE AGREEMENT<sup>ii iii iv v</sup>

This Agreement dated \_\_\_\_\_ 20[●]<sup>vi</sup> is between:

- (3) [●] (the “**RPO**”), [an academic institution incorporated or established under [statute or charter in Ireland],] whose [principal address or registered office] is at [●]<sup>vii</sup>; and
- (4) [●] (the “**COMPANY**”), [a company incorporated in [●] under registration number [●]], whose [principal place of business or registered office] is at [●]<sup>viii</sup>.

The RPO and COMPANY together shall be referred to as the “**Parties**”, and “**Party**” shall mean either one of them.

### Background:

The Parties wish to hold discussions in the field of [●]<sup>ix</sup> (the “**Field**”). Each Party wishes to receive confidential information in the Field from the other Party for the purpose of considering whether to enter into a further agreement with the other Party (the “**Permitted Purpose**”).

### The Parties agree as follows:

#### 1. Definitions

1.1. In this Agreement, the following words shall have the following meanings:

<b>Authorised Persons</b>	shall have the meaning given in clause 3.1.
<b>Confidential Information</b>	shall mean: <ul style="list-style-type: none"> <li>(a) in respect of Information provided in documentary form or by way of a model or in other tangible form, Information which at the time of provision is marked or otherwise designated to show expressly or by necessary implication that it is imparted in confidence; and</li> <li>(b) in respect of Information that is imparted orally, any information that the Disclosing Party or its representatives informed the Receiving Party at the time of disclosure was imparted in confidence<sup>x</sup>; and</li> <li>(c) in respect of Confidential Information imparted orally, any note or record of the disclosure [and any evaluation materials prepared by the Receiving Party that incorporate any Confidential Information]; and</li> <li>(d) any copy of any of the foregoing; and</li> <li>(e) [the fact that discussions are taking place between the Disclosing Party and the Receiving Party.]<sup>xi</sup></li> </ul>
<b>Disclosing Party</b>	shall mean the Party to this Agreement that discloses Information, directly or indirectly to the Receiving Party under or in anticipation of this Agreement.
<b>FOIA</b>	shall mean the Freedom of Information Acts 1997 and 2003 and includes any subordinate legislation made under it and any provision

	amending, superseding or re-enacting it (whether with or without modification).
<b>Information</b>	shall mean information [whether of a technical, commercial or any other nature whatsoever] provided directly or indirectly by the Disclosing Party to the Receiving Party in oral or documentary form or by way of models, biological or chemical materials or other tangible form or by demonstrations and whether before, on or after the date of this Agreement.
<b>Receiving Party</b>	shall mean the Party to this Agreement that receives Information, directly or indirectly from the Disclosing Party.

## 2. Confidentiality obligations

- 2.1. In consideration of the Disclosing Party providing Confidential Information, at its discretion, to the Receiving Party, the Receiving Party shall:
- 2.1.1. keep the Confidential Information secret and confidential;
  - 2.1.2. neither disclose nor permit the disclosure of any Confidential Information to any person, except for disclosure to Authorised Persons in accordance with clause 3, or to a court or other public body in accordance with clause 4;
  - 2.1.3. not use the Confidential Information for any purpose, whether commercial or non-commercial, other than for the Permitted Purpose;
  - 2.1.4. [make [no copies of the Confidential Information] [only such limited number of copies of the Confidential Information as are required for the Permitted Purpose, and provide those copies only to Authorised Persons];]<sup>xii</sup> and
  - 2.1.5. take proper and all reasonable measures to ensure the confidentiality of the Confidential Information.

## 3. Disclosure to employees

- 3.1. The Receiving Party may disclose the Confidential Information to those of its officers, employees [and professional advisers] (together, the “**Authorised Persons**”) who:
- 3.1.1. reasonably need to receive the Confidential Information to enable the Receiving Party to achieve the Permitted Purpose;
  - 3.1.2. have been informed by the Receiving Party (a) of the confidential nature of the Confidential Information, and (b) that the Disclosing Party provided the Confidential Information to the Receiving Party subject to the provisions of a written confidentiality agreement;
  - 3.1.3. have written confidentiality obligations to the Receiving Party that (a) are no less onerous than the provisions of this Agreement, and (b) apply to the Confidential Information, and who have been instructed to treat the Confidential Information as confidential<sup>xiii</sup>;
  - 3.1.4. [in the case of the Receiving Party’s professional advisers] [other than its solicitors], [have been provided with a copy of this Agreement and] have agreed with the Receiving Party in writing to comply with the obligations of the Receiving Party under this Agreement, [and should it opt in writing to do so, the Disclosing Party will be entitled to be a party to that agreement]<sup>xiv</sup>; and
  - 3.1.5. [in the case of the Receiving Party’s solicitors, have confirmed that they will treat the Confidential Information as if it were the Receiving Party’s confidential information and

therefore subject to the rules of the Law Society in Ireland concerning client information.]<sup>xv</sup>

- 3.2. The Receiving Party shall be responsible for taking reasonable action to ensure that its Authorised Persons comply with the Receiving Party's obligations under this Agreement and shall be liable to the Disclosing Party for any breach of this Agreement by such Authorised Persons.

#### 4. Disclosure to court, etc.

- 4.1. To the extent that the Receiving Party is required to disclose Confidential Information by order of a court or other public body that has jurisdiction over the Receiving Party, it may do so. Before making such a disclosure the Receiving Party shall, if the circumstances permit:

- 4.1.1. inform the Disclosing Party of the proposed disclosure as soon as possible (and if possible before the court or other public body orders the disclosure of the Confidential Information);
- 4.1.2. ask the court or other public body to treat the Confidential Information as confidential; and
- 4.1.3. permit the Disclosing Party to make representations to the court or other public body in respect of the disclosure and/or confidential treatment of the Confidential Information.

#### 5. Exceptions to confidentiality obligations

- 5.1. The Receiving Party's obligations under clause 2 shall not apply to Confidential Information that:
- 5.1.1. the Receiving Party possessed before the Disclosing Party disclosed it to the Receiving Party; or
- 5.1.2. is or becomes publicly known, other than as a result of breach of the terms of this Agreement by the Receiving Party or by anyone to whom the Receiving Party disclosed it; or
- 5.1.3. the Receiving Party obtains from a third-party, and the third-party was not under any obligation of confidentiality with respect to the Confidential Information; or
- 5.1.4. it can show (as demonstrated by its written records or other reasonable evidence) has been developed by any of the Receiving Party's employees who have not had any direct or indirect access to, or use or knowledge of, the Confidential Information.

#### 6. [Freedom of Information]<sup>xvi</sup>

- 6.1. The COMPANY acknowledges and agrees that the RPO is subject to the FOIA and the codes of practice issued under the FOIA as may be amended, updated or replaced from time to time.
- 6.2. The COMPANY acknowledges and agrees that:
- 6.2.1. subject to clauses 6.2.2 and 6.3, the decision on whether any exemption applies to a request for disclosure of recorded information under the FOIA is a decision solely for the RPO; and
- 6.2.2. if the RPO is processing a request under the FOIA to disclose any Confidential Information then the COMPANY shall co-operate with the RPO, at the RPO's reasonable cost and expense, and shall use reasonable efforts to respond within ten (10) working days of the RPO's request for assistance in determining whether an exemption to the FOIA applies.

- 6.3. If the RPO determines, in its sole discretion, that it will disclose any of the COMPANY's Confidential Information, it shall use reasonable efforts to notify the COMPANY in writing prior to any such disclosure. In any event, the RPO shall not disclose any Confidential Information which falls within any of the exemptions of the FOIA and will consult with COMPANY to decide how best to respond to any FOIA request before any response is made.]

## 7. Return of information and surviving obligations

- 7.1. Subject to clause 7.2, the Receiving Party shall (a) at the Disclosing Party's request, and (b) upon any termination of this Agreement:
- 7.1.1. either return to the Disclosing Party or destroy (at the Disclosing Party's option) all documents and other materials that contain any of the Confidential Information, including all copies made by the Receiving Party representatives;
  - 7.1.2. permanently delete all electronic copies of Confidential Information from the Receiving Party's computer systems; and
  - 7.1.3. provide to the Disclosing Party a certificate, signed by an officer of the Receiving Party, confirming that the obligations referred to in clauses 7.1.1 and 7.1.2 have been met.
- 7.2. As an exception to its obligations under clause 7.1, the Receiving Party may retain one copy of the Confidential Information, in paper form, in the Receiving Party's legal files for the purpose of ensuring compliance with the Receiving Party's obligations under this Agreement.
- 7.3. Following the date of any termination of this Agreement<sup>xvii</sup>, or any return of Confidential Information to the Disclosing Party ("**Final Date**"), (a) the Receiving Party shall make no further use of the Confidential Information, and (b) the Receiving Party's obligations under this Agreement shall otherwise continue in force, in respect of Confidential Information disclosed prior to the Final Date, in each case [for a period of [1] [5] [10] [15] [20] years from the [date of this Agreement][Final Date]] [without limit of time]<sup>xviii</sup>.

## 8. General

- 8.1. The Receiving Party acknowledges and agrees that all property, including intellectual property, in Confidential Information disclosed to it by the Disclosing Party shall remain with and be vested in the Disclosing Party.
- 8.2. This Agreement does not include, expressly or by implication, any representations, warranties or other obligations:
- 8.2.1. to grant the Receiving Party any licence or rights other than as may be expressly stated in this Agreement;
  - 8.2.2. to require the Disclosing Party to disclose, continue disclosing or update any Confidential Information;
  - 8.2.3. to require the Disclosing Party to negotiate or continue negotiating with the Receiving Party with respect to any further agreement, and either party may withdraw from such negotiations at any time without liability; nor
  - 8.2.4. as to the accuracy, efficacy, completeness, capabilities, safety or any other qualities whatsoever of any information or materials provided under this Agreement.
- 8.3. This Agreement shall be governed by and construed in accordance with laws of the Republic of Ireland and each Party agrees to submit to the [non-]exclusive jurisdiction of the courts of the Republic of Ireland<sup>xix</sup>.

**Agreed by the Parties through their authorised signatories:**

**For and on behalf of**  
*[Insert full legal name of the RPO]*

**For and on behalf of**  
*[Insert full legal name of the COMPANY]*

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Signed

\_\_\_\_\_  
Name

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**Drafting Notes:**

<sup>i</sup> This CDA is appropriate for use when both parties will be sharing confidential information. If there is no expectation that a party will disclose any confidential information, then a one-way CDA may be used instead.

<sup>ii</sup> This CDA includes a number of alternative provisions, which are shown in square brackets. An explanation of when these alternative provisions may be used is provided in the corresponding footnote.

<sup>iii</sup> Users of this Model Agreement should note that the authors have not drafted it to take account of the individual requirements of Irish RPOs which might apply. Users are advised to seek out and address by additional provisions, any peculiarities or requirements of a relevant RPO.

<sup>iv</sup> Users of this Model Agreement are advised that the authors have not drafted it to be used by or in relation to consumers. Contracts concluded with consumers are obliged to include an additional layer of legal protections, to be written in plain-spoken language and to contain other features imposed by consumer-specific laws which are not dealt with in this template.

<sup>v</sup> Users of this Model Agreement should be aware that in some situations the law relating to 'state aid' might need to be considered (e.g. in relation to 'information exchanges'). This is a complex area and there is no 'one-size-fits-all' way of dealing with it. Accordingly, the user should seek specialist advice when required.

<sup>vi</sup> This should be the date on which the last party signs, and should be inserted by the last signatory on that date.

<sup>vii</sup> Insert the full name of the RPO, the statute or charter under which it was incorporated or established, and its principal/registered address. Individual RPOs will have their own legal formalities which will need to be completed to bind the RPO.

<sup>viii</sup> Insert the full name of the company (or other entity), its incorporation number, and its principal/registered address. This Model Agreement has been designed for use with a commercial entity.

<sup>ix</sup> Insert a description of the relevant field.

<sup>x</sup> Some recipients require orally disclosed confidential information to be confirmed in writing, but for many RPOs this requirement may present potential difficulties and the benefit of the CDA may be lost through an administrative oversight.

<sup>xi</sup> Many commercial organisations do not want the fact that discussions are taking place with an RPO to be in the public domain. The RPO however may wish to use this information for marketing purposes. Therefore, it needs to be weighed up on a case-by-case basis whether it is appropriate for the RPO to agree to any request to keep knowledge of the discussions confidential.

<sup>xii</sup> If the information is particularly sensitive, the RPO may require the Company to keep records of all individuals who have received the confidential information and/or to stipulate the names of the individuals to whom the information may be disclosed.

<sup>xiii</sup> This clause should usually be uncontroversial. The RPO should be aware that if the Company pushes back on this point then it may be inappropriate for the RPO to disclose its confidential information to the Company if the Company's employees are not bound by any confidentiality obligations.

<sup>xiv</sup> The receiving party may need to disclose the information to external advisers. The disclosing party should consider if this is acceptable. Some advisers may have conflicts of interest or may also act for competitors of the disclosing party. The disclosing party should consider if it should enter directly into a CDA with the external adviser so as to give it a right to bring legal proceedings directly against the advisor if the advisor is in breach of the CDA.

<sup>xv</sup> This clause is drafted to apply to solicitors. Most CDAs do not include such a provision.

<sup>xvi</sup> The FOIA operates by prescribing a list of bodies subject to the FOIA. It is likely that an RPO would be subject to the obligations of the FOIA, but the list of bodies prescribed in the FOIA should be checked to determine whether this clause is relevant to the particular RPO. If subject to the FOIA, the RPO would be required to respond to requests made under the FOIA provisions. This may be a concern for the Company as it will not want its confidential information disclosed. There are a number of exemptions within the FOIA and it will be important for the RPO to evaluate whether any of these exemptions apply before it discloses the Company's confidential information. It is important to ensure that the RPO notifies the Company of any potential disclosure prior to a disclosure being made.

<sup>xvii</sup> This CDA, and many others, does not include a termination provision. In cases where the parties enter into a further contract, the CDA typically will be superseded by the confidentiality provisions in that agreement. Alternatively, the CDA will continue until one party gives reasonable notice to the other party that it no longer wishes the CDA to continue.

<sup>xviii</sup> The parties will need to decide what is an appropriate duration given the confidential information being disclosed. It may be that the parties decide that the information should be treated as confidential for as long as it does not fall within an exception of clause 5. Many organisations will however not agree to unlimited obligations and will request a definitive date on when the obligations cease. It is important to consider external influences. For example, the information technology market is fast moving and therefore long periods of confidentiality may not be appropriate. Many CDAs contain a provision of 5 years.

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<sup>xix</sup> Where this Model Agreement is adapted to be used to govern the performance of obligations in a jurisdiction outside of the Republic of Ireland, users should note that their ability to enforce the rights and obligations set out here may be subject to the law of that jurisdiction and that local legal advice may need to be sought.

**KTI** Knowledge Transfer Ireland  
Enterprise Ireland, The Plaza,  
East Point Business Park, Dublin 3.

**T** +353 (0)1 727 2000  
**E** [kti@knowledgetransferireland.com](mailto:kti@knowledgetransferireland.com)  
**W** [knowledgetransferireland.com](http://knowledgetransferireland.com)