

CHAPTER 9

Confidentiality and Proprietary Information

In a private enterprise economy, individual small landowners or farmers, and owners of companies or multi-national corporations, prize the privacy of information about their assets and business dealings. Their information is their property. The law recognizes and protects this.

As a natural resource professional, you may have occasion to deal with confidential private information. In addition, you may work for a public enterprise such as a state forest system that sells timber or mineral rights, that buys land, or manages land for a water district. This involves you in business transactions of a sort that most of us are hardly prepared for at all in our formal education.

CONFIDENTIAL BUSINESS INFORMATION

As an employee of a private business, you will quickly be made aware of what information is considered confidential by the owners/managers (oftentimes, all of it!). You may work for such entities as a consultant in wetland delineation, environmental permitting, preparation of EIS's, or forest or wildlife management. In such a setting you may work with highly sensitive business information.

As noted previously, in such instances you will usually sign a confidentiality or nondisclosure agreement, which may provide for the return of the information when you are finished with it.

There are several categories of confidential business information:

- Business data such as sales, prices, costs, and profits (under antitrust laws, discussions about information such as prices with other competitors is illegal).

- Information about customers or vendors, their identity, sales activity, etc.
- Proprietary information about technology such as formulations of products, industrial processes, etc.
- Environmental monitoring data.

Specific examples from forestry:

- Information as to timber inventories, harvest levels and growth from private cruise or inventory data. Such information is considered highly sensitive by most owners, especially large corporate owners.
- Corporate research results. Some large companies conduct costly programs of research on forest management practices, growth and yield. Some companies consider certain results to be highly sensitive. Copies of reports may even be numbered and marked with instructions that users keep them in a safe.
- Information prepared for attorneys in tax cases or other litigation.
- Real estate appraisals or development plans.
- Plans for mill expansions or construction of new mills or woodyards.

As a consultant, you may conduct projects such as cost benchmarking, market price surveys for wood, or wood use projections in which you need to gain the use of other companies' proprietary information. They, of course, will only supply such information to persons they believe they can trust not to improperly disclose that information to others. Typically, the consultant promises to blend all information into a general average so as not to reveal individual competitor operations.

GOVERNMENT DATA: SUNSHINE LAWS

In the 1960s and 1970s, a major trend emerged to open up government to scrutiny from the legislative branch and the press. Barriers of custom and regulation that had kept a lot of information under wraps were removed by so-called "sunshine laws."

Not all information in government possession is available to the public under sunshine laws, however. Depending on the laws/

regulations of your state or agency, *the following kinds of information may be protected as confidential*:

- Proposals and bid documents submitted to the agency in competitive bid situations (often, but not always, handled by a separate procurement agency).
- Data protected as confidential by statute.
- Appraisals or other data submitted by private parties in land acquisition or similar negotiations.
- Materials in the hands of your attorneys in preparation for or contemplation of litigation.

The above categories include information considered to be private property legitimately protected by a confidentiality privilege. Its presence in the files of public agencies does not automatically cancel the property rights of its owners. Without specialized advice, you may not be able to make that determination yourself. Private documents submitted for use in negotiations and protected by legitimate confidentiality rules are often returned to the owners so that there is no uncertainty as to its status. Alternatively, such materials can be filed with an agency's attorneys.

Some forms of internally-generated information may also be confidential. An important example in the conservation field would be materials assembled in the process of law enforcement investigations. For very good reasons, including protecting the rights of the innocent, files being prepared while investigating violations of land use, forest fire, forest practices, or fish and game laws may be held confidentially at least for a time. Generally, officers engaged in law enforcement receive thorough training on the rules.

In some organizations, draft materials, such as drafts of pending legislation, speeches, or policy papers are considered legitimately confidential until their final versions are completed and become public. The purpose is to protect the policy development process from leaks and grandstanding by parties at interest. Leaks of early or incomplete information may even be stage-managed by political leaders anxious to gain leverage from "trying the case in the press." Such behavior is now commonplace.

Confidentiality of government-held information is primarily a matter of recognizing the issue, learning the rules, and following

them. As you move on in your career, you will encounter new situations for the first time.

You may be the first one to notice an issue, and will have to seek guidance yourself, as nobody may have thought to brief you on these issues. For guidance in these situations, you must consult early and regularly with your organization's legal counsel.

When I worked at the Maine Department of Conservation, the Assistant Attorney General who worked with forestry used to say, only half in jest: "If you don't follow my advice, I won't defend you."

CONFIDENTIALITY OF RESEARCH MATERIALS

This book is not a primer on ethics in science, but in your work, you may encounter information that deserves confidential treatment. You may be shown or asked to review copies of research or project proposals, working drafts of research papers or administrative studies, and similar material.

Authors of these materials have the right to assume that you will not, without their authorization, copy such materials, share them with anyone with a competing interest in the information, or quote them in your own work, with or without attribution.

WHISTLE-BLOWING

This is a complex and difficult topic about which whole books have been written. It is considered briefly above under Duties to Employers and clients. Whistle-blowing often involves disclosure of information which, while perhaps legally confidential, contains evidence of wrongdoing of one sort or another. A whistleblower may incur legal liability for the acts of disclosure, or may be sanctioned by management for infractions of confidentiality.

If you are ever in a situation where you think whistle-blowing is legitimately necessary, you should learn more about the subject and seek unbiased advice before taking action.