

Can you keep *a secret?*

Non-Disclosure Agreements and commercial archaeologists

Joe Abrams, MCIFA (1829), Abrams Archaeology



A Non-Disclosure Agreement (NDA) is a legal document that businesses can use when sharing sensitive information with another organisation. An NDA may control how information is used and set rules on how it is kept confidential.

Archaeologists are most likely to encounter an NDA in the procurement and/or implementation stage of certain projects. These are likely to be of a certain scale (eg infrastructure), or when involving sensitive locations. The term NDA appears in the media in different contexts and, partly because of the wider

uses of the term and the practices around it, there can be a certain amount of anxiety, even stigma, around signing one.

What should an NDA cover?

This will vary as it will be tailored to the specifics of a project and the entity or entities sponsoring it. However, amongst the topics we should see covered are:

- 1 What form will the sensitive information take? Is it written or verbal communication/s? Is it administrative documentation, reports and drawings?
- 2 For how long will the obligations last? Normally, this would be for several years and that is relevant for archaeologists who have obligations outside the NDA to archive and publish archaeological material and findings
- 3 How will information be stored? For how long? And how will it be destroyed?
- 4 Some NDAs will require that the existence of the NDA itself should not be disclosed. This can be for the protection of commercially sensitive information (eg a nascent joint venture). Is this the case, and why?
- 5 A section on permitted disclosures and exceptions to non-disclosure, allowing an organisation the flexibility to share information with specific sub-contractors
- 6 Understanding that exceptions to non-disclosure are necessary to allow disclosure under other circumstances, including where required by law or by the rules of a court. This last point should provide comfort where individuals may be concerned in relation to the principles of whistleblowing. An NDA needs an agreed means for an individual, or organisation, to be able to co-operate with a legal investigation, or the rules of a court.

Ways of approaching the checking of an NDA

Frame of mind – Firstly, we have almost certainly sought out the *opportunity* associated with the NDA. Our organisation may have worked hard to be considered eligible for the tender or project. The NDA may have been anticipated as part of this. We should note then, that we may be primed to agree, or find a way to agree, and this is worth reflecting on; this solution focus needs to run in parallel with careful checks on the details.





Romain Dancre,
Unsplash

Checking and consultation where needed – Some Registered Organisations have vast amounts of experience of this, with individuals who have encountered many types of NDA. Other organisations may encounter them infrequently. Each organisation must identify individuals with appropriate skills and experience to carry out this task, and/or to reach out to external legal advisors where needed.

Cifa Code of conduct – Accredited members of Cifa are expected to adhere to the *Code of conduct*. This is relevant to what members can sign up to in an NDA and it is a good example of where fluency with the *Code* is important. Some of the specific areas where we may benefit from this are

- **confidentiality** – Rule 1.10 begins ‘A member shall not reveal confidential information unless required by law’ and the sentiment of such a phrase could be found in many NDAs, so as a sector we often behave in these ways anyway and it is worth reflecting on how familiar some of the practices required by an NDA are already
- **dissemination of archaeological information** – Rule 1.10 refers to Principle 4: ‘The member has responsibility for making available the results of archaeological work with reasonable dispatch.’ By so doing, the *Code* reminds us of our principal responsibilities to the public. Pointing out to a client or employer the potential ethical consequences of confidentiality, where it may affect this timely dissemination, is an obligation
- **sharing research** – Rules 4.1 and 4.3 describe our obligation to share research with colleagues, and 4.2 and 4.4 sharing that research with the public. Rule 4.7 states that a member must honour

contractual obligations: ‘A member shall respect contractual obligations in reporting but shall not enter into a contract which prohibits the member from including their own interpretations or conclusions in the resulting record, or from a continuing right to use the data after completion of the project. While a client employer may legitimately seek to impose whatever conditions of confidentiality they wish, a member shall not accept conditions which require the permanent suppression of archaeological discoveries or interpretations.’ This is very relevant for NDAs if they potentially prohibit the dissemination of archaeological research. There must be an understanding that any withholding of archaeological data is for good reason and for an agreed length of time

- **professional ethics** – On occasion, complex situations can arise, where right and wrong are not easily perceived and may not even be fixed. These situations may mean that an individual experiences an ethical dilemma. ‘A member may find themselves in an ethical dilemma where they are confronted by competing loyalties, responsibilities or duties. In such circumstances a member shall act in accordance with the Principles of the Code of conduct.’

Principle 1, Section 1.13

Knowing all this gives us clarity and helps us to move out of the individual experience of the dilemma. There is our individual experience, there are the interests of our company/employer and there are the responsibilities we have to our professional body. In such circumstances, help is at hand. The Cifa website has excellent resources on this topic including digital training modules, articles and a practice paper (<https://www.archaeologists.net/membership/ethics>).

.....

Joe Abrams

Joe is a Director of Abrams Archaeology. He is on the Advisory Council of the Cifa. He has worked in the commercial archaeological sector for over 20 years and held senior posts in several archaeological consultancies and contracting companies. Joe takes an active interest in the understanding and application of professional ethics within our sector.

