VORYS

Publications

Nondisclosure Agreements in Economic Development: Best Practices and Special Public Entity Issues

Related Attorneys

Scott J. Ziance

Sean P. Byrne

Related Services

Real Estate

Tax and Economic Development Incentives

Taxation

AUTHORED ARTICLE | Fall 2020

This article originally appeared in the Fall 2020 edition of *Development Incentives Quarterly*.

By: Scott Ziance and Sean Byrne

Nondisclosure agreements (NDAs) or confidentiality agreements are commonplace in commercial transactions, especially in deals that are negotiated privately before any public disclosure, or if parties need to share proprietary information. In the context of economic development transactions, NDAs are sometimes used, but their limitations are often misunderstood.

Incentives transactions generally involve a private sector entity applying for financial or other incentives from one or more governmental or quasi-governmental entities. Incentive transactions can involve critical information that the company needs to keep confidential until the incentives negotiations are complete. For instance, a company considering relocating to a new state may not want its competitors, employees or potential sellers of property to know what locations are being considered. However, the desired confidentiality runs squarely against public records laws, which require the governmental entity to provide transparency that is incongruous with confidential business transactions.

In light of this inherent conflict, the first step in negotiating NDAs in the incentives context is to know your counterparty. Second, review the appropriate state law to determine if there is room to negotiate any protective provisions limiting disclosures. Third, try to negotiate effective protections, recognizing that broad and one-sided protections may be unenforceable. Finally, consider strategies to minimize disclosures.

Know your Counterparty

If you are a developer or business considering a new location, you may be seeking both local and state incentives. To whom do you actually provide project information? Is there an economic development non-governmental organization (NGO) that serves as a clearing-house for all information or does each governmental entity need the details?

If there is an NGO negotiating on behalf of the state or local governments, your NDA should look more like a traditional commercial NDA. However, if you are negotiating with a public entity, the rules can be very different. Be cautious, though, because some public entities look like they might be NGOs (such as non-profit organizations like land banks, community improvement corporations and port authorities). Even if the entity appears to be outside of the government, with business board members or being described as a corporation, it is critical to understand whether state public record laws apply to that entity, and whether any special exemptions are available.

Review the Law

Unfortunately, it is not enough to simply ask your counterparty whether it is subject to public records law. Some organizations do not understand their potential responsibilities, or believe that an exemption will be broad enough to exclude your information. For those reasons, it is critical to check the statutory provisions.

When reviewing that statutes, begin by looking at the laws governing public records generally. Those provisions will likely list a number of exemptions to consider. Following the general overview, review the laws governing the particular type of public entity. For example, port authorities may have different exemptions from public records than those of community improvement corporations, though both may be public entities and generally subject to public records law. It is also helpful to review the entity's public records policy, which may be available on-line. Another valuable resource can be public record compilations, often prepared by the state's Attorney General, such as the Public Information Act Handbook in Texas and the Sunshine Manuals in Ohio and Florida.

With the legal provisions in hand, you can decide what NDA provisions will be enforceable, and what strategies you may want to undertake to limit exposure of your confidential information.

Negotiate Effective Protections

If your counterparty is an NGO, and is not subject to public records laws, the key provisions will be the same as if it was a traditional private sector NDA. You will want to identify the proper parties, define what constitutes confidential information, determine the scope (what can the information be used for), note exclusions to confidentiality (agents, third parties with an NDA, as required by a court order) and the term of the agreement. You also want to be clear about what happens: (a) if there is a discovery or other request for the information (ensure you have sufficient notice to seek a protective order); (b) post-termination (is confidential information destroyed or returned); and (c) if there is a breach (injunctive relief). Of all these typical terms and conditions, be especially cognizant of whether information, and what information, will be provided by the NGO to a public entity and whether that public entity is required to (and is able to) maintain confidentiality.

If your counterparty is subject to public records law, it is important that the NDA address this directly. It will not work to simply take a private sector form off the shelf – even if the public entity representative signs the NDA, it may be unenforceable. For that reason, it is important to acknowledge public records law and tackle the challenges it raises head-on.

First, be mindful that the NDA itself may be a public record. Consider who should sign the NDA, and whether the NDA can be transferable. For instance, you might use a special purpose entity or a third party advisor to provide the information, identifying only the project name, not the actual company seeking the incentive.

Second, by having reviewed the statutory provisions around the state's public records law, and the exceptions, you may be able to craft the NDA to be consistent with the public records law. For example, if the public records law excludes business and financial information, ask the public entity to agree that, to the extent information provided is business and financial information, the public entity will keep it confidential, and if the public entity believe the records being provided are not business and financial information, provide an opportunity to require return of the non-confidential documents (if applicable law does not prohibit it). You also want to be sure that your NDA does not purport to require destruction of documents in a timeframe inconsistent with the counterparty's record retention requirements. The governmental entity will likely retain the documents rather than risk running afoul of an record retention audit, so keep in mind how long the documents are likely to be held (and consider requiring them be destroyed immediately after the required retention period expires).

Third, in a twist on the typical discovery or court order notice in a commercial NDA, propose a provision that will require notice and an opportunity to respond to any public record requests. The public entity may require you to indemnify it against any claims due to any delays or refusal to comply with public records laws, but you may be able to defend the records as not being subject to public records or freedom of information statutes.

Strategic Approaches – Minimize Disclosures

Your NDA is not as effective to protect confidential information as not providing the records to your counterparty at all. Among the strategies to consider: allow visual review of documents but do not provide copies; negotiate redactions; use a special purpose entity (not identified with the company); employ a third party to provide the information on a client-anonymous basis.

Some public entities may reject entering into an NDA altogether, or may provide terms that offer no real protection to the incentive seeker. In those situations, try to work with the public entity to determine if there are alternatives. For instance, you could agree that you will make compliance or other information available for inspection but not copying. This will allow the public entity to review the books and records relevant to the incentive, but will not create a "record" – the underlying requirement of most public records laws. If the public entity receives a request, it does not have a problematic record to produce. Similarly, if certain information can be redacted, it is helpful to identify and redact that information at the beginning of the negotiations. Keeping in mind that incentives can last thirty years or more, and certain confidential information may remain confidential indefinitely, it can be important to agree to redactions and redact documents now so that new administrators, years from now, do not inadvertently disclose confidential information the parties thought was protected at the time the incentive was negotiated.

The use of a third party, or a special purpose entity that is not directly connected to the company, can protect the identity of an applicant for incentives. It is important that the incentive NDA be assignable to the real party in interest. It is also critical that the parties still carefully guard the applicant's identity, at least until the incentive is awarded. This approach can be an effective solution when there are multiple locations being considered and the key confidential information to be protected by the NDA can become public at the conclusion of the incentives process.

Lessons Learned

NDAs, especially with public entities, are too often either an after-thought or are unenforceable as drafted by trying to require a governmental entity to keep public records confidential in violation of the law. You cannot just take a private sector (or even a public sector) form off of the shelf. It is important to carefully review state law and also to consider a strategic approach to disclosing information that you want treated as confidential. Whatever understandings are reached by the parties need to be documented, and it is important that NDAs take into consideration record retention processes and similar legal requirements. Taking the time to understand your counterparties' procedures for handling confidential information is also critical. You do not want to be in a position where the new administrator (or new administration) has no idea that an NDA exists, or does not know what material it covers.

Limiting the information you provide is the optimal solution, but may require frank conversations with your counterparty to determine what information they really need, what information they can protect, and what information would be nice to have but may be able to be provided in another form or forum. Most public records laws only apply to "records" so, although it may seem more burdensome, consider having confidential documents available to be reviewed by not copied or submitted to the governmental entity. Finally, be mindful that your government counterparty does not want to disclose confidential information any more than you do, but must work within statutes and administrative rules that may not provide much discretion – your counterparty may have the best ideas on how to work within their structure to provide the information needed for the public without disclosing the secret sauce of your project or business.

Vorys encourages you to contact your Vorys attorney or advisor with questions about this program. Please feel free to contact the following Vorys attorneys: Scott J. Ziance, 614.464.8287, sjziance@vorys.com; or Sean Byrne, 614.464.8247, spbyrne@vorys.com.