

Criteria for Confidentiality Orders for Traditional Knowledge Study Reports

The Panel is mindful of its responsibility under section 3.0 of its Mandate “to promote and facilitate the contribution of traditional knowledge to the environmental impact review.” Sections 22 and 23 of the Rules of Procedure provide that the Panel will encourage the submission of traditional knowledge (TK), including oral history, and may make appropriate arrangements to obtain information from or hear the testimony of an elder or the holder of traditional knowledge during hearings. In its announcement of May 16, 2005, the Panel encouraged the submission of TK and invited individuals to speak to these matters at Community and General Hearings, for at least the following three purposes:

1. Issues identification (what people are concerned about, what people value, what may be at risk from the Project);
2. Baseline information about the communities and the environment in the Project area; and
3. Prediction of Project impacts and the implementation of effective mitigation measures and follow-up effects monitoring.

The Panel is aware that Parties may also wish to file specific TK study reports with the Panel. Some Parties may wish to file such study reports confidentially. Therefore, the Panel is issuing this statement of Criteria for Confidentiality Orders for Traditional Knowledge Study Reports.

The Panel’s Mandate, and the Panel’s Rules of Procedure and its Direction on Procedures for Hearings, provide that all information received by the Panel during the conduct of the environmental impact review of the EIS is, generally speaking, to be made public.

However, section 45 of the Panel’s Direction on Procedures for Hearings provides:

45. The Joint Review Panel may make a ruling or issue a direction on procedure to limit the introduction of or to prevent the disclosure of information or documents in order to protect information of a confidential or sensitive nature, including but not limited to matters involving security, business, personal or proprietary interests.

The Panel will consider motions, filed in accordance with section 45, requesting an order that specific TK study reports, or parts thereof, be filed with the Panel on a confidential basis and that the contents of such study reports not be disclosed on the public record.

In ruling on any such motion, the Panel will consider:

- (a) whether a confidentiality order is necessary in order to prevent a serious risk to an important interest, such as the interest of a community in preventing the exploitation of that community’s traditional knowledge by others, because reasonably alternative measures will not prevent the risk; and

- (b) whether the beneficial effects of a confidentiality order would outweigh the harmful effects of the order, including the effects of the order on the public interest in an open and accessible Panel process.

Parties requesting that the Panel issue a confidentiality order with respect to a particular TK study report should, therefore, identify in their motion (filed in accordance with the Panel's Direction on Procedures for Hearings):

- (a) the interest that would allegedly be harmed by the public disclosure of the TK study report (including identifying the specific part(s) of the TK study report the disclosure of which would cause such harm); and
- (b) the nature of the harm that would allegedly be suffered. Parties should also address whether the alleged harm would outweigh the interest of other Parties, and the general public, in maintaining a transparent review process.

In considering any such motion, the Panel may request that the TK information which it is sought to maintain as confidential be provided to the Panel, on a confidential basis, to assist the Panel in ruling on the motion. If the Panel decides not to issue a confidentiality order, such information will be returned to the relevant Party. In that event, the Panel, when making any recommendations, could not rely on the relevant TK information.

If the Panel issues a confidentiality order, any information filed pursuant to that order will not be voluntarily disclosed by the Panel. Parties should understand, however, that the Panel may be directed to disclose such information pursuant to access to information legislation or by court order. When deciding whether to seek a confidentiality order, Parties should make their own assessment of the risk that the relevant information might ultimately be so disclosed.

The Panel recognizes that the risk of disclosure might dissuade some Parties from filing specific TK study reports they would otherwise wish to have before the Panel. Parties may, therefore, wish to consider alternatives to filing a motion for a confidentiality order with respect to a specific TK study report. In particular, they might consider whether they could make their points to the Panel as effectively if they were to:

- (a) provide the TK study report with site-specific information blacked out or omitted; or
- (b) provide a summary report of the TK study report, including the methodology, key concerns and proposed mitigation measures.